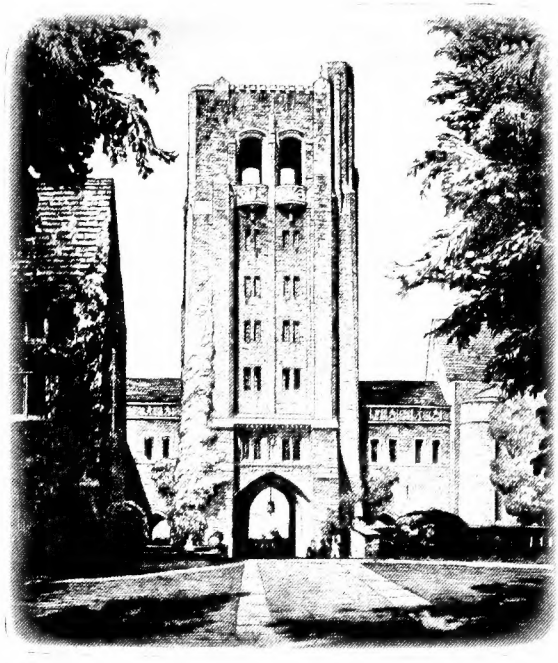


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CASES

ON THE

MEASURE OF DAMAGES.

To accompany this volume.

ELEMENTS OF THE LAW OF DAMAGES. By ARTHUR G. SEDGWICK.

A

COLLECTION OF CASES

ON THE

MEASURE OF DAMAGES.

BY

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PREFACE.

THE importance of the law of Damages as a subject for study in the schools is now becoming recognized; and this collection of cases is offered primarily for the use of students, though it is believed that it will be found useful by the practising lawyer. It may be studied alone; it is however especially designed for use in connection with Mr. Arthur G. Sedgwick's treatise on the law of Damages published in the same series.

It is impracticable to include in such a collection cases involving every principle of the law of Damages; nor if it could be done would it be advisable, since many of the cases would have little or no educational value. It has been attempted to cover most fundamental conceptions peculiar to the law of Damages, difficult or controverted principles, and questions of novelty or of special present importance. For such parts of the subject as are not here treated, the student is advised to consult Mr. Sedgwick's treatise. It was found impossible to follow the same division and order of presentation in the two works, because of their differing aim and scope. There will be no difficulty, however, in finding in Mr. Sedgwick's treatise the discussion of a particular subject. In his Table of Cases, the name

of most cases contained in this book may be found; and the student may thus consult Mr. Sedgwick's treatise in connection with each case herein, and familiarize himself with such principles as are not discussed in these cases. A consultation of Mr. Sedgwick's Index will solve such other difficulties as may be felt.

In reprinting these cases, I have given only the opinion when it seemed sufficiently to state the facts; and the omission of other parts of a case has not always been indicated. The omission of part of an opinion has always been noted; and if the part of the opinion here reprinted is not consecutive in the original report, the omissions are indicated by points. The notes are the compiler's, unless otherwise marked.

J. H. BEALE, JR.

CAMBRIDGE, *October* 1, 1895.

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CASES ON DAMAGES.

CHAPTER I.

FUNCTIONS OF COURT AND JURY IN ESTIMATING DAMAGES.

HUNT *v.* J.

Common Pleas, 1319. Maynard's Year Book, 375.

Miles le Hunt of Stratford brought writ of debt against Simon de J., and demanded from him 30 quarters of wheat of the value of £20, and put forward a deed which witnesses the debt, &c. Simon says that he was within age at the time of the making of the deed, &c. The inquest says that he was of full age, &c. [The Court] Of what value was the wheat at the time he should have paid it?

The Inquest. At the time he made the writing the quarter was worth only 3*s*., but when he should have paid it, it was worth 12*s*. Bereford, C.J. Speak of the damages from the *detinue*. The Inquest. To the damage of £10.

And because the value of the wheat at the time he should have paid amounted to £18, *scil*. 12*s*. the quarter, it was suggested to the court that the damages were taxed too high, wherefore the court reduced the damages and awarded that he should receive £18 for the wheat and 40*s*. for the damages. And so note, that whereas he demanded wheat he recovered the value of the wheat at the time it should have been paid, and not the wheat. Likewise that although the defendant was held liable for the claim because he was found of full age, the plaintiff did not recover the price set in his writ, but the price taxed by the inquest, *ut supra*. Likewise note, that the justices measured the damages, as appears, &c.

DELVES *v.* WYER.

Common Pleas, 1605. 1 Brownl. 204.

The plaintiff brought an action of trespass for breaking his close, and for cropping 200 pear-trees and 100 apple-trees, and damage found to £40. And the court was moved by *Richardson*, for that the damages might be mitigated, because he produced an affidavit whereby it appeared that the party himself before the action brought would have took £5; but denied. For the court said that they could not diminish the damages in trespass which was local, and therefore could not appear to them, and the damages might well amount to £40 for cropping of an orchard: and so

Judgment entered.

HAWKINS *v.* SCIET.

King's Bench, 1622. Palmer, 314.

In action on the case for calling one a bankrupt, it was found on general issue for the plaintiff, and £150 damages given. And for this great damage the court, by reason of certain circumstances, reduced them to £50. But afterwards, upon great consideration, they revoked this, and would not change the course of law; and resolved to leave such matters of fact to the finding of the jury, which better knows the quality of the persons and their estate, and the damage that they may sustain by such disgrace. Otherwise where the action is grounded on a cause which may appear in the sight of the court, so that they may judge of it, as in mayhem, &c. And so is Dyer, 105. And therefore they give judgment on the verdict for £150.

LORD TOWNSEND *v.* HUGHES.

Common Pleas, 1677. 2 Mod. 150.

The plaintiff brought an action of *scandalum magnatum* for these words spoken of him by the defendant, viz., "He

is an unworthy man, and acts against law and reason." Upon Not guilty pleaded, the case was tried, and the jury gave the plaintiff four thousand pounds damages.[1] It was therefore moved for a new trial upon these reasons: Thirdly, and which was the principal reason, because the damages were excessive.

The court delivered their opinions *seriatim*. And first,

North, C.J., said: In cases of fines for criminal matters, a man is to be fined by Magna Charta with a *salvo contenemento suo;* and no fine is to be imposed greater than he is able to pay; but in civil actions the plaintiff is to recover by way of compensation for the damages he hath sustained, and the jury are the proper judges thereof. This is a civil action brought by the plaintiff for words spoken of him, which if they are in their own nature actionable, the jury ought to consider the damage which the party may sustain; but if a particular averment of special damages make them actionable, then the jury are only to consider such damages as are already sustained, and not such as may happen in future, because for such the plaintiff may have a new action. He said, that as a judge he could not tell what value to set upon the honor of the plaintiff; the jury have given four thousand pounds, and therefore he could neither lessen the sum or grant a new trial, especially since by the law the jury are judges of the damages; and it would be very inconvenient to examine upon what account they gave their verdict; they, having found the defendant guilty, did believe the witnesses, and he could not now make a doubt of their credibility.

Wyndham, J., accorded *in omnibus*.

Atkins, J., *contra*. That a new trial should be granted, for it is every day's practice; and he remembered the case of Gouldston *v.* Wood, in the King's Bench, where the plaintiff in an action on the case for words for calling of him bankrupt, recovered fifteen hundred pounds, and that court granted a new trial, because the damages were excessive.

[1] Part of the case, not involving a question of damages, is omitted.

The jury in this case ought to have respect only to the damage which the plaintiff sustained, and not to do an unaccountable thing that he might have an opportunity to show himself generous; and as the court ought with one eye to look upon the verdict, so with the other they ought to take notice what is contained in the declaration, and then to consider whether the words and damages bear any proportion; if not, then the court ought to lay their hands upon the verdict: it is true, they cannot lessen the damages, but if they are too great the court may grant a new trial.

Scroggs, J., accorded, with North and Wyndham, that no new trial can be granted in this cause. He said, that he was of counsel with the plaintiff before he was called to the bench, and might therefore be supposed to give judgment in favor of his former client, being prepossessed in the cause, or else (to show himself more signally just) might without considering the matter give judgment against him; but that now he had forgot all former relation thereunto; and therefore delivered his opinion, that if he had been of the jury he should not have given such a verdict; and if he had been plaintiff he would not take advantage of it; but would overcome with forgiveness such follies and indiscretions of which the defendant had been guilty: but that he did not sit there to give advice, but to do justice to the people. He did agree that where an unequal trial was (as such must be where there is any practice with the jury), in such case it is good reason to grant a new trial; but no such thing appearing to him in this case, a new trial could not be granted. Suppose the jury had given a scandalous verdict for the plaintiff, as a penny damages, he could not have obtained a new trial in hopes to increase them, neither shall the defendant in hopes to lessen them. And therefore by the opinion of these three justices a new trial was not granted.

ASH *v.* LADY ASH.

King's Bench, 1695. Comb. 357.

Assault, battery, and false imprisonment. The Lady Ash pretended that her daughter the plaintiff was troubled in mind, and brought an apothecary to give her physic; and they bound her, and would have compelled her to take physic. She was confined but about two or three hours, and the jury gave her £2000 damages.

Sir Barth. Shower moved for a new trial for the excessiveness of the damages.

Holt, C.J. The jury were very shy of giving a reason of their verdict, thinking they have an absolute despotic power, but I did rectify that mistake, for the jury are to try causes with the assistance of the judges, and ought to give reasons when required, that if they go upon any mistake they may be set right. And a new trial was granted.

COOK *v.* BEAL.

Common Pleas, 1696. 1 Ld. Raym. 176.

Trespass, assault and battery. The plaintiff declares, that the defendant *cum manu sua ipsum Thomam Cook super sinistrum oculum percussit et violavit ita quod* the said Thomas Cook, viz., the plaintiff *penitus inhabilis devenit ad scribendum vel legendum*, being an officer of the excise, &c. Not guilty pleaded. Verdict for the plaintiff. And Birch, Serjeant, moved, that the court would increase the damages, upon affidavit that the plaintiff had lost his eye. But the court ordered the plaintiff to appear in court in person, for otherwise they said, that they could not increase the damages; upon which the plaintiff was brought into court. And afterwards the court after several motions resolved,

1. That if the word *mayhemiavit* is not in the declaration, yet if the declaration be particular, so that it appears, by the

description, that the wound was a maim, it is sufficient, and the court may increase damages. Rast. Ent. 46, *a*; 8 Hen. 4. 21, *b*.

2. Resolved, that the court may increase the damages if the wound be apparent, though it be not a maim. And so it was done in the case of Lord Foliot, Sty. 310; 1 Roll. Abr. 573, *l*. 13; 7 Vin. 278, pl. 4; 2 Danv. 452, pl. 4. Therefore, in this case, because the wound is visible, though it be no maim (for it is not a maim because the eye is not wholly out, but the plaintiff only declares, *quod inhabilis ad legendum vel scribendum devenit* by the wound), yet damages may be increased. And POWELL, J., said, that Holt, C.J., was of that opinion. So (*per* POWELL, J.), though the loss of a nose is not a maim, to bring an action *felonice* for the loss of it, yet the court may in such case increase the damages. And he said, that the court might increase the damages upon a writ of inquiry, because that was but a bare inquest of office, and a case between Swalley and Babington was cited, where in a general action of assault, battery, and wounding, upon view the damages were increased about four years ago, upon the motion of Serjeant *Lovell*.[1]

MELLISH *v.* ARNOLD.

Exchequer, 1719. Bunb. 51.

IN an action brought against an officer for a seizure *absque probabili causa* a new trial was granted, because the jury threw up cross or pile, whether they should give the plaintiff three hundred pounds or five hundred pounds damages, and the chance of five hundred pounds came up.

BARKER *v.* DIXIE.

King's Bench, 1737. 2 Strange, 1051.

IN case for a malicious prosecution of an indictment for felony, the jury found for the plaintiff, and gave 5*s*. damages.

[1] The third resolution is omitted.

And upon motion for a new trial on account of the smallness of damages, the court held there could be no new trial on that account: for this was not a false verdict, as finding for the defendant would be, and would subject them to an attaint; whereas they having found rightly for the plaintiff, no attaint would lie. And new trials came in the room only of attaints, as a more expeditious and easy remedy.

BEARDMORE *v.* LORD HALIFAX.

Common Pleas, 1763. Sayer on Damages, 228.

In an action of trespass there was a verdict for the plaintiff with fifteen hundred pounds damages. Upon a motion for a new trial on account of the excessiveness of the damages, it appeared from the report of Pratt, C.J., before whom the cause was tried, that the defendant had granted an illegal warrant against the plaintiff in consequence of which the house of the plaintiff had been entered and his papers looked into; and that he had been carried from his house and confined six days. The Chief Justice concluded his report with saying that he did not think the damages excessive. A new trial was refused; and by

Pratt, C.J. If in an action founded upon a tort there be any rule by which the court may measure the damages, as in an action of trespass for destroying a field of corn, a new trial ought to be granted, if damages to a much larger amount than the value of the corn are assessed; but the court ought never to grant a new trial in an action founded upon a personal tort, unless the damages are such as do at the first blush appear to be quite outrageous. Because the damages, which do entirely depend upon the circumstances of the particular case, must in every such action be ideal and speculative, and the jury are the persons in whom the power of ascertaining damages in all cases is by the constitution vested.

PHILLIPS *v.* LONDON & S. W. RAILWAY.

Court of Appeal, 1879. 5 Q. B. Div. 78.

This was an appeal by the defendants from a decision of the Queen's Bench Division directing a new trial. The application was made on the ground of insufficiency of damages and misdirection.[1] The jury gave the plaintiff £7000. The plaintiff moved for a new trial, which was granted by the Queen's Bench Division on the ground that the amount of damages given by the jury was so small as to show that they must have left out of consideration some of the circumstances which ought to have been taken into account. The defendants appealed.

James, L.J. In this case we are of opinion that we cannot on any of the points differ from the judgment of the Queen's Bench Division.

The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which, generally speaking, is considered to be within their exclusive province, that is to say, the amount of damages. We agree that judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less; still the verdicts of juries as to the amount of damages are subject, and must, for the sake of justice, be subject, to the supervision of a court of first instance, and if necessary of a court of appeal in this way, that is to say, if in the judgment of the court the damages are unreasonably large or unreasonably small, then

[1] Only so much of the case as involves the question of damages is given. The plaintiff was a physician who had been making an income of between £6000 and £7000 a year; by negligence of defendants he had suffered a personal injury, the result of which was that there was no hope that he would ever be able to resume his profession, or even recover so far as to have any enjoyment of life.

the court is bound to send the matter for reconsideration by another jury. The Queen's Bench Division came to the conclusion in this case that the amount of the damages was unreasonably small, and for the reasons which were given by the Lord Chief Justice, pointing out certain topics which the jury could not have taken into consideration. I am of opinion, and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the damages are unreasonably small, to what extent of course we must not speculate, and have no business to say. We are, therefore, of opinion that the Queen's Bench Division was right in directing a new trial.

BRETT and COTTON, L.JJ., concurred.

Appeal dismissed.

WORSTER *v.* PROPRIETORS OF THE CANAL BRIDGE.

Massachusetts, 1835. 16 Pick. 541.

THIS was case, to recover damages for injuries alleged to have been sustained by the plaintiff, in consequence of a defect in the bridge of the defendants. The trial was before Wilde, J., on the general issue. The jury returned a verdict in favor of the plaintiff, for the sum of $600. The defendants thereupon filed a motion for a new trial, and assigned the following causes: 1. Because the damages were excessive.[1]

WILDE, J., delivered the opinion of the court. In regard to the first reason assigned for a new trial, we are of opinion, that the damages assessed are not so excessive and unreasonable as to warrant the interference of the court in a matter which is peculiarly within the province of the jury to determine. In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury and not the opinion

[1] Only so much of the case as refers to this point is given.

of the court is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. In the present case the plaintiff was exposed to the imminent peril of his life, to great bodily and mental suffering, and we cannot say that the sum assessed by the jury exceeds a reasonable compensation. We do not consider whether or not we should have assessed the same amount of damages if the case had been submitted to the court to decide; for in a case like the present, men of sound judgment may differ not a little in estimating the compensation which the circumstances of the injury would justify; and it is the judgment of the jury, and not that of the court, which must govern. To justify the interposition of the court, the damages must be manifestly exorbitant; and this we cannot say in the present case.

ROBINSON *v.* TOWN OF WAUPACA.

Wisconsin, 1890. 77 Wis. 544.

This is an action to recover damages for personal injuries to the plaintiff, alleged to have been caused by a defective highway in the defendant town. The trial resulted in a verdict for the plaintiff, assessing her damages at $167. The plaintiff moved for a new trial, mainly on the ground that the damages so assessed are inadequate to compensate her for the injury she proved she sustained. The motion was denied, and judgment was thereupon entered for the plaintiff, pursuant to the verdict from which judgment she appeals to this court.

Lyon, J. Were the damages which the jury awarded the plaintiff so inadequate to compensate her for the injuries she sustained that it was the duty of the Circuit Court to set aside the verdict for that reason? That the court may, and in a proper case should, set aside a verdict for inadequacy of damages and award a new trial, is not questioned. This court so held in Emmons *v.* Sheldon, 26 Wis. 648, and Whit-

ney *v.* Milwaukee, 65 Wis. 409. But, to justify the interference of the court with the verdict, it must appear from the testimony that the damages awarded are so grossly disproportionate to the injury that in awarding them the jury must have been influenced by a perverted judgment. The court was able thus to characterize the verdict in Emmons *v.* Sheldon, for the damages there awarded were but $5 (which charged the plaintiff with the costs of the action), although it was proved that the plaintiff suffered a most serious bodily injury. There seems to have been no controversy as to the extent of such injury. And so in Whitney *v.* Milwaukee, the undisputed evidence proved that the plaintiff was so seriously injured that the damages awarded by the jury therefor were grossly inadequate compensation, and so small that the plaintiff was chargeable with the costs, which exceeded the damages awarded. This court was able to say that the verdict was perverse, and that (quoting from the opinion delivered by Mr. Justice Orton) "such a verdict is trifling with a case in court and public justice, and unworthy of twelve good and lawful men, and is justly calculated to cast odium on the jury system and jury trials."

We adhere to the rule established in those cases. Hence the question is, Does the testimony bring this case within the rule? In the consideration of this question we must assume that the jury found every fact going to mitigate or reduce the damages which they could properly find from the proofs. The testimony tends to show that the plaintiff was to some extent an invalid before she was injured, and that the pain and disability she has suffered since the injury should, in part at least, be attributed to previous ill-health. Then the circumstances of the injury and her condition presently thereafter tend to show that the injury was not so severe as claimed. There is considerable testimony of the above character, and we think it sufficient materially to mitigate her claim for damages. Under the testimony, therefore, there is a wide margin for the jury in assessing damages. Probably a verdict for a much larger sum could have

been held not excessive. Perhaps, if the plaintiff's testimony as to the extent of her injuries stood alone, it ought to be held that the damages are inadequate. But in view of all the testimony, and of the fact that the verdict has successfully passed the scrutiny of the learned Circuit judge, we do not feel warranted in saying that it is a perverse verdict. Hence, although we might have been better satisfied had a somewhat greater sum been awarded, we are not at liberty to disturb the verdict.

By the Court. — The judgment of the Circuit Court is affirmed.

BALTIMORE & OHIO RAILROAD *v.* CARR.

Maryland, 1889. 71 Md. 135.

Alvey, C.J.[1] This is an action on the case brought by the appellee against the appellant for the wrongful refusal of admission of the former to the cars of the latter. The jury was instructed, that if they found for the plaintiff for the refusal to pass him through the gate, then he was entitled to such damages as they might find would, under all the circumstances, compensate him for such refusal. This left the whole question of damages at large, without definition by the court, to the discretion of the jury, and without any criterion to guide them. What compensation would embrace — whether actual and necessary expenses incurred by reason of the refusal, or the mere delay, or disappointment in pleasure, or the possible loss in business transactions, however remote or indirect, or for wounded feelings — were matters thrown open to the jury, and they were allowed to speculate upon them without restraint. This is not justified by any well-established rules of law. In the case of Knight *v.* Egerton, 7 Exch. 407, where, in effect, such an instruction was given, the Court of Exchequer held it to be wholly insufficient, "and that it was the duty of the judge to inform the jury what was the true measure of damages on the issue, whether the

[1] Part of the opinion is omitted.

point was taken or not;" and the court directed a new trial because of the indefinite instruction as to the true measure of damages. The rule by which damages are to be estimated is, as a general principle, a question of law to be decided by the court; that is to say, the court must decide and instruct the jury in respect to what elements, and within what limits, damages may be estimated in the particular action. Harker *v.* Dement, 9 Gill, 7; Hadley *v.* Baxendale, 9 Exch. 341, 354. The simple question whether damages have been sustained by the breach of duty or the violation of right, and the extent of damages sustained as the direct consequences of such breach of duty or violation of right, are matters within the province of the jury. But beyond this juries, as a general rule, are not allowed to intrude, as by such intrusion all certainty and fixedness of legal rule would be overthrown and destroyed.

New trial awarded.

CHAPTER II.

EXEMPLARY DAMAGES.

HUCKLE *v.* MONEY.

Common Pleas, 1763. 2 Wils. 205.

PRATT, L.C.J.[1] In all motions for new trials, it is as absolutely necessary for the court to enter into the nature of the cause, the evidence, facts, and circumstances of the case, as for a jury; the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; torts or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, &c., the state, degree, quality, trade, or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered by a jury in giving damages; the few cases to be found in the books of new trials for torts show that courts of justice have most commonly set their faces against them; and the courts interfering in these cases would be laying aside juries; before the time of granting new trials, there is no instance that the judges ever intermeddled with the damages.

I shall now state the nature of this case, as it appeared upon the evidence at the trial; a warrant was granted by Lord Halifax, Secretary of State, directed to four messengers, to apprehend and seize the printers and publishers of a paper called the North Briton, number 45, without any information

[1] The opinion of the Lord Chief Justice alone is given, as it sufficiently states the case.

or charge laid before the Secretary of State, previous to the granting thereof, and without naming any person whatsoever in the warrant; Carrington, the first of the messengers to whom the warrant was directed, from some private intelligence he had got that Leech was the printer of the North Briton, number 45, directed the defendant to execute the warrant upon the plaintiff (one of Leech's journeymen), and took him into custody for about six hours, and during that time treated him well; the personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the king's subjects exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the king's counsel, and saw the Solicitor of the Treasury, endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner; these are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages;[1] to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject: I thought that the 29th chapter of Magna Charta, *Nullus liber*

[1] In Sayer on Damages, p. 220, the Lord Chief Justice is reported to have added: "Wherever an injury is done under the color of authority, as if an officer empowered to press exceed the authority given him by the press warrant; or if a master of a ship abuse the power by law vested in him over the sailors under his command; or if, as in the present case, a person is arrested upon a general warrant, the jury in assessing damages are not confined to the damages which have been actually sustained, but ought to assess exemplary damages."

homo capiatur vel imprisonetur, &c., nec super eum ibimus, &c., nisi per legale judicium parium suorum vel per legem terræ, &c., which is pointed against arbitrary power, was violated. I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages, against the Solicitor-General's argument. Upon the whole, I am of opinion the damages are not excessive; and that it is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.

GODDARD *v.* GRAND TRUNK RAILWAY.

Maine, 1869. 57 Me. 202.

Walton, J.[1] It appears in evidence that the plaintiff was a passenger in the defendants' railway car; that, on request, he surrendered his ticket to a brakeman employed on the train, who, in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterwards approached the plaintiff, and, in language coarse, profane, and grossly insulting, denied that he had either surrendered or shown him his ticket; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his face, and, shaking it violently, told him not to yip, if he did he would spot him, that he was a damned liar, that he never handed him his ticket, that he did not believe he paid his fare either way; that this assault was continued

[1] Part of the opinion only is given.

some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in his seat; that he had neither said nor done anything to provoke the assault; that, in fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman, who delivered it to the conductor only a few minutes before, by whom it was afterwards produced and identified; that the defendants were immediately notified of the misconduct of the brakeman, but, instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried, and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct. . . .

What is the measure of relief which the law secures to the injured party; or, in other words, can he recover exemplary damages? We hold that he can. The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago. . . .

But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for their own wilful and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly nor impliedly authorized nor ratified by the corporation; and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; they were simply cases of

mistaken duty; and what these same courts would have done if a case of such gross and outrageous insult had been before them as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.

We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly nor impliedly authorized nor ratified by the defendant, the plaintiff could not recover exemplary damages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the malice of the servant and the malice of the corporation, or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence, called a corporation. And yet under cover of its name and authority there is, in fact, as much wickedness, and as much that is deserving of punishment, as can be found any-

where else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in stocks, — since, in fact, no corrective influence can be brought to bear upon them except that of pecuniary loss, — it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage men can be secured, who will not handle and smash trunks and bandboxes, as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations; and that is, the pocket of the moneyed power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.

It is our judgment, therefore, that actions against corporations, for the wilful and malicious acts of their agents and servants in executing the business of the corporation, should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest courts in the country.

Motion and exceptions overruled.

TAPLEY, J., dissented.

MURPHY *v.* HOBBS.

Colorado, 1884. 7 Col. 541.

HELM, J. This is a civil action, brought to recover damages for malicious prosecution and false imprisonment. Plaintiff procured a verdict, and judgment was duly entered thereon. Defendant prosecutes this appeal, and assigns in support thereof numerous errors. The most important of these assignments is one which relates to the measure of damages adopted in the court below.

Upon this subject the following instruction was there given: "That the measure of damages in an action for malicious prosecution is not confined alone to actual pecuniary loss sustained by reason thereof; but if it is believed, from the evidence, that the arrest and imprisonment stated in the complaint were without probable cause, then the jury may award damages to plaintiff to indemnify him for the peril occasioned to him in regard to personal liberty, for injury to his person, liberty, feelings and reputation, and as a punishment to defendant in such further sum as they shall deem just."

By the assignment of error and argument challenging the correctness of this instruction, we are called upon to consider the following question, viz.. Can damages, as a punishment, be recovered in cases like this?

The rule allowing, under certain circumstances, in civil actions based upon torts, exemplary, punitive, or vindictive damages, for the purpose of punishing the defendant, has taken deep root in the law. It has the sanction of learned courts and law writers, among the latter Mr. Sedgwick; and its abrogation should be favored only upon the most weighty consideration. But we find denying its correctness, Professor Greenleaf and several courts of the highest respectability.

As we shall presently see, the question is not conclusively

res judicata in Colorado. We therefore feel at liberty to inquire into the reasons urged against the doctrine.

Were this subject now presented to the various courts of the country for the first time, we have little doubt as to what the verdict would be; the propriety of adhering exclusively to the rule of compensation appears, upon careful investigation, with striking clearness. But many of the courts, like that of Wisconsin, while expressing strong disapprobation of the doctrine "inherited," and declaring it "a sin against sound judicial principle," feel constrained to preserve it, on account of precedent in their respective States, and the "current of authority elsewhere." Brown *v.* Swineford, 44 Wis. 282.

Perhaps the most impressive objection to allowing damages as a punishment in cases like the one at bar is that which relates to dual prosecution for a single tort. Our State Constitution declares that no one shall be twice put in jeopardy for the same offence. A second criminal prosecution for the same act after acquittal, or conviction and punishment therefor, is something which no English or American lawyer would defend for a moment. But here is an instance where practically this wrong is inflicted. The fine awarded as a punishment in the civil action does not prevent indictment and prosecution in a criminal court. On the other hand, it has been held that evidence of punishment in a criminal suit is not admissible even in mitigation of exemplary damages in a civil action. Cook *v.* Ellis, 6 Hill, 466; Edwards *v.* Leavitt, 46 Vt. 126.

Courts attempt to explain away the apparent conflict with the constitutional inhibition above mentioned; they say that the language there used refers exclusively to criminal procedure and cannot include civil actions. Brown *v.* Swineford, *supra*. But this position amounts to a complete surrender of the evident spirit and intent of that instrument. When the convention framed, and when the people adopted the Constitution, both understood the purpose of this clause to be the prevention of double prosecutions for the same offence. Yet under the rule allowing exemplary damages,

not only may two prosecutions, but also two convictions and punishments, be had. What difference does it make to the accused, so far as this question is concerned, that one prosecution takes the form of a civil action, in which he is called defendant? He is practically harassed with two prosecutions and subjected to two convictions: while no hypothesis, however ingenious, can cloud in his mind the palpable fact that for the same tort he suffers two punishments.

An effort has been made to mitigate the undeniable hardship and injustice by declaring that juries in the second prosecution, whether it be civil or criminal in form, may consider the punishment already inflicted. But both reason and authority conclusively show that this proposition is illusory; that the application of such a rule is impracticable; and that the attempt to apply it, while producing confusion, would not effectively accomplish the purpose intended.

A second weighty objection to the rule under discussion relates to procedure. It is doubtful if another instance can be found within the whole range of English or American jurisprudence, where the distinctions between civil and criminal procedure are so completely ignored. Plaintiff sues for damages arising from the injury done to himself. His complaint or declaration is framed with a view to compensation for a purely private wrong: it need not be under oath, and does not inform defendant that he is to be tried for a public offence. The summons makes no mention of punishment; it simply commands defendant to appear and answer in damages for the private injury inflicted upon plaintiff. When the cause is called for trial, no issue upon a public criminal charge is fairly presented by the pleadings.

A trial and conviction are had, and punishment by fine is inflicted, without indictment or sworn information.

The rules of evidence peculiarly applicable in criminal prosecutions are rejected.

The doctrine of reasonable doubt is replaced by the rule controlling in civil actions, and a mere preponderance in the

weight of testimony warrants conviction; defendant is compelled to testify against himself, and such forced testimony may produce the verdict under which he is punished; depositions may be read against him, and thus the right of meeting adverse witnesses face to face be denied.

The law fixes a maximum punishment for criminal offences, and in this State the presiding judge determines the extent thereof, where a discretion is given; but under the rule we are considering, the jury are entirely free from control, except through the court's power — always unwillingly exercised — to set aside the verdict: they may, for an offence which is punishable under criminal statutes by $100 fine at most, award as a punishment many times that sum.

And finally, when the defendant has been punished in the civil action, he is denied the privilege of pleading such expiation in bar of a criminal prosecution for the same offence. He can hope for no executive clemency in the civil suit; and if imprisoned upon the second conviction, under the authorities, *habeas corpus* does not lie to aid him.

The incongruities of this proceeding are not confined to the criminal branch of the law. Civil actions are instituted for the purpose of redressing private wrongs; it is the aim of civil jurisprudence to mete out as nearly exact justice as possible, between contending litigants; there ought to be no disposition to take from the defendant or give to the plaintiff more than equity and justice require.

Yet under this rule of damages these principles are forgotten, and judicial machinery is used for the avowed purpose of giving plaintiff that to which he has no shadow of right. He recovers full compensation for the injury to his person or property; for all direct and proximate losses occasioned by the tort; for the physical pain, if any, inflicted; for his mental agony, lacerated feelings, wounded sensibilities; and then, in addition to the foregoing, he is allowed damages, which are awarded as a punishment of defendant and example to others. Who will undertake to give a valid reason why plaintiff, after being fully paid for all the injury inflicted

upon his property, body, reputation, and feelings, should still be compensated, above and beyond, for a wrong committed against the public at large? The idea is inconsistent with sound legal principles, and should never have found a lodgment in the law.

The reflecting lawyer is naturally curious to account for this "heresy" or "deformity," as it has been termed. Able and searching investigations, made by both jurist and writer, disclose the following facts concerning it, viz.: That it was entirely unknown to the civil law; that it never obtained a foothold in Scotland; that it finds no real sanction in the writings of Blackstone, Hammond, Comyns, or Rutherforth; that it was not recognized in the earlier English cases; that the Supreme Courts of New Hampshire, Massachusetts, Indiana, Iowa, Nebraska, Michigan, and Georgia have rejected it in whole or in part; that of late other States have falteringly retained it because "committed" so to do; that a few years ago it was correctly said, "At last accounts the Court of Queen's Bench was still sitting hopelessly involved in the meshes of what Mr. Justice Quain declared to be 'utterly inconsistent propositions.'" And that the rule is comparatively modern, resulting, in all probability, from a misconception of impassioned language and inaccurate expressions used by judges in some of the earlier English cases.

See Professor Greenleaf's response to Mr. Sedgwick's criticism of the former's views on this subject, 2 Greenl. Ev. 235 *et seq.*; also the opinion of the court, delivered by Mr. Justice Foster, in Fay *v.* Parker, 53 N. H. 342.[1]

It has been with no little reluctance that we have arrived at the foregoing conclusion as to the doctrine of punitive or exemplary damages. The persuasive reasons and strong array of authorities in support of the rule, the corresponding convictions of a large part of the bench and bar of the State, and the confusion that may exist for a time, have impelled us to the most careful and conservative deliberation. But we feel that the doctrine of compensation as explained is

[1] Part of the opinion is omitted.

more in consonance with the reason, the logic, the science of the law; that it is more in harmony with the dictates of equity and justice, and that the tendency of the courts and writers is favorable to its exclusive adoption, or, more correctly speaking, re-adoption. We deem it wiser to accept and declare the rule now than to resist for a time and ultimately be compelled to do so, when the confusion produced would be tenfold greater than at present is possible.

The judgment is reversed, and the cause remanded for a new trial. *Reversed.*

HAINES *v.* SCHULTZ.

New Jersey Supreme Court, 1888. 50 N. J. L. 481.

GARRISON, J. The defendant below, who is the proprietor of the Morning Call, was sued in libel for uttering the following language of and concerning the plaintiff:

"HOUSE ROBBED.

"A YOUNG LADY BOARDER SUPPOSED TO KNOW SOMETHING ABOUT IT.

"Last night, while Mr. and Mrs. Richard Krowley were at Little Coney Island, their house, No. 3 Hamburgh Avenue, was entered by some one who got away with a considerable amount of clothing. Mr. Krowley is of the opinion that a young lady boarder named Mamie Schultz knows something about the theft. The girl has been a boarder at the house for about seven weeks; and according to Dick's statement Mamie had a number of admirers, and on several occasions she has stayed out late at nights, and no later than last Sunday night she climbed through the window of Mr. and Mrs. Krowley's sleeping apartments, and Dick is of the opinion that she gained an entrance through the same window last night. On entering the house Mrs. Krowley discovered a bureau drawer and a clothes closet open, and to her surprise found that the house had been ransacked and a large number of pieces of her underclothing, together with ribbons and other articles,

were missing. Dick visited the police station and notified Captain Bimson who advised him to go before the recorder this morning and make a complaint."

The testimony shows that this article was written by a reporter in the employ of the defendant, and that it was inserted in the paper without defendant's knowledge, his first intimation of it being the service upon him of the declaration in this cause.

No special damages were shown.

The plaintiff recovered a substantial verdict against defendant.

Five exceptions taken by defendant at the trial are the subject of as many assignments of error.

The first is upon the refusal of the court to order a nonsuit at the close of plaintiff's case, for alleged failure of proof. This exception may be dismissed with the remark that the question as to whether the language published tended to disgrace the plaintiff, was properly left to the jury.

The other assignments are based upon exceptions to the charge of the court, and are addressed to that portion of the charge on which the law as to exemplary damages is stated.

The fourth assignment is as follows:

"But the defendant says, 'I personally had no hand in this.' That is true, but it appears that Mr. Keegan, his reporter, wrote it and had it inserted in the newspaper, and that from the time it was written up to the present day the defendant has never had a word of blame for Mr. Keegan, and Mr. Keegan still remains in his employ. So far as appears, his conduct is approved by his employer. There is nothing in the case to show that it is disapproved. If you believe, then, that Mr. Keegan's conduct is approved by his employer in this matter, you have a right to see what Mr. Keegan's conduct was upon this question of punishment."

This language occurs in the charge of the court after the rules for the admeasurement of compensatory damages have been announced to the jury.

The general subject of exemplary damages is introduced

with the following remark: "But when you have determined what sum you will award her for compensation, you ask yourself, 'Will that sum punish the defendant adequately for his conduct?' You turn then to his conduct and see what it is, whether it will call for any punishment beyond what the sum that may be awarded Mamie Schultz as compensation will inflict." Then follows a series of instructions as to the allowance of punitive damages, one of which is the exception under consideration.

It will be noticed that the proposition laid down by the court is not alone that the defendant may be visited with exemplary damages for language inserted in his paper, although without his knowledge or consent; but that the imposition of punishment in damages will be controlled by the same considerations which fix his liability for the publication, unless the defendant adduces proof of his *dis*approval of the libellous article. In other words, that the defendant may be mulcted in punitive damages upon the same proof which established his liability for compensatory damages, unless he shows or it appears that he disapproved of the act of his subordinate.

The liability of the defendant to respond, both in compensatory and exemplary damages, in a proper state of the evidence, is not questioned. It is the proposal to relieve the plaintiff of the burden of proof and to transfer it to the defendant that invites discussion.

Proprietors of newspapers are unquestionably liable in law for whatever appears in their columns. Libellous publication is a wrongful act; and when to a wrongful act we add testimony from which a wrongful motive can be inferred, punitive damages may be inflicted.

But the maxim *respondeat superior* is a rule of limitation as well as of liability. If a principal must, on the one hand, answer for his agent's wrong-doing, on the other hand his liability is circumscribed by the scope of his agent's employment, unless there be proof of a ratification by him of his agent's misconduct.

No rule of law is better established than this.

The same principle applies, and with equal force, to the doctrine of exemplary damages.

Without stopping to review the history of this class of so-called damages, it is sufficient to say that the right to award them rests primarily upon the single ground — wrongful motive. The ingrafting of this notion on to personal suits has resulted in an anomalous rule, the doctrine of punitive damages being a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine. But, whether we regard it in the one light or the other, it is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite. But in legal contemplation previous intent is presumed from ratification, and *e converso* proof of ratification must be made where a previous intent is not presumed.

The learned judge correctly apprehended this rule when he placed the defendant's liability to punishment in damages upon the ground of his implied approval of his employee's misconduct. And had there been any proof of such approval, any testimony of general instructions, of which this libel was the outgrowth, any evidence as to ratification, the jury might have been warranted in inferring a wrongful motive to fit the wrongful act. But absence of proof of his disapproval, absence of proof that defendant had reproached his employee, or that he had discharged him — in fine, absence of all proof bearing on the essential question, to wit, defendant's motive — cannot be permitted to take the place of evidence without leading to a most dangerous extension of the doctrine, *respondeat superior*.

A plaintiff, whose claim to punitive damages rests upon a wrongful motive of defendant, not inherent in the offence which fixes his legal liability, must present some proof from which such wrongful motive may be legally inferred.

Inasmuch as the plaintiff below failed to do this, the instruction of the court upon this point was misleading.

The judgment of the Circuit Court should be reversed.

LAKE SHORE & M. S. RAILWAY *v.* PRENTICE.

Supreme Court of the United States, 1893. 147 U. S. 101.

GRAY, J. The only exceptions taken to the instructions at the trial, which have been argued in this court, are to those on the subject of punitive damages.

The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers, — such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment, — is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several States. Railroad Co. *v.* Lockwood, 17 Wall. 357, 368; Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 443; Myrick *v.* Railroad Co., 107 U. S. 102, 109; Hough *v.* Railway Co., 100 U. S. 213, 226.

The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the king's messengers for trespass and imprisonment, under general warrants of the Secretary of State, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover "exemplary damages," the Chief Justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages

are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Wilkes *v.* Wood, Lofft, 1, 18, 19, 19 Howell, St. T. 1153, 1167. See, also, Huckle *v.* Money, 2 Wils. 205, 207; Sayer, Dam. 218, 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. The Amiable Nancy, 3 Wheat. 546, 558, 559; Day *v.* Woodworth, 13 How. 363, 371; Railroad Co. *v.* Quigley, 21 How. 202, 213, 214; Railway Co. *v.* Arms, 91 U. S. 489, 493, 495; Railway Co. *v.* Humes, 115 U. S. 512, 521; Barry *v.* Edmunds, 116 U. S. 550, 562, 563; Railway Co. *v.* Harris, 122 U. S. 597, 609, 610; Railway Co. *v.* Beckwith, 129 U. S. 26, 36.

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of The Amiable Nancy, 3 Wheat. 546. . . .

The rule thus laid down is not peculiar to courts of admi-

ralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. Manufacturing Co. *v.* Fiske, 2 Mason, 119, 121. In Keene *v.* Lizardi, 8 La. 26, 33, Judge Martin said: "It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." To the same effect are The State Rights, Crabbe, 42, 47, 48; The Golden Gate, McAll. 104; Wardrobe *v.* Stage Co., 7 Cal. 118; Boulard *v.* Calhoun, 13 La. Ann. 445; Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447; Grund *v.* Van Vleck, 69 Ill. 478, 481; Becker *v.* Dupree, 75 Ill. 167; Rosenkrans *v.* Barker, 115 Ill. 331; Kirksey *v.* Jones, 7 Ala. 622, 629; Pollock *v.* Gantt, 69 Ala. 373, 379; Eviston *v.* Cramer, 57 Wis. 570; Haines *v.* Schultz, 50 N. J. Law, 481; McCarthy *v.* De Armit, 99 Pa. St. 63, 72; Clark *v.* Newsam, 1 Exch. 131, 140; Clissold *v.* Machell, 26 U. C. Q. B. 422. . . .

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. Railroad Co. *v.* Quigley, Railway Co. *v.* [illegible]ms, and Railway Co. *v.* Harris, above cited; Caldwell *v.* Steamboat Co., 47 N. Y. 282; Bell *v.* Railway Co., 10 C. B. (N. S.) 287, 4 Law T. (N. S.) 293.

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal

is, of course, liable to make compensation for the whole injury suffered. Kennon *v.* Gilmer, 131 U. S. 22; Meagher *v.* Driscoll, 99 Mass. 281, 285; Smith *v.* Holcomb, Id. 552; Hawes *v.* Knowles, 114 Mass. 518; Campbell *v.* Car Co., 42 Fed. Rep. 484. . . .

The president and general manager, or, in his absence, the vice-president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself; but the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is not more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce.

The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards Chief Justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that "punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed." This instruction was held to be right, for the following reasons: "In cases where punitive or exemplary damages have been assessed, it has been done, upon evidence of such wilfulness, recklessness, or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon

the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's act. No man should be punished for that of which he is not guilty." "Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant." Hagan *v.* Railroad Co., 3 R. I. 88, 91.

The like view was expressed by the Court of Appeals of New York in an action brought against a railroad corporation by a passenger for injuries suffered by the neglect of a switchman, who was intoxicated at the time of the accident. It was held that evidence that the switchman was a man of intemperate habits, which was known to the agent of the company having the power to employ and discharge him and other subordinates, was competent to support a claim for exemplary damages, but that a direction to the jury in general terms that in awarding damages they might add to full compensation for the injury "such sum for exemplary damages as the case calls for, depending in a great measure, of course, upon the conduct of the defendant," entitled the defendant to a new trial; and Chief Justice Church, delivering the unanimous judgment of the court, stated the rule as follows: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established

by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless, and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." Cleghorn *v.* Railroad Co., 56 N. Y. 44, 47, 48.

Similar decisions, denying upon like grounds the liability of railroad companies and other corporations, sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas, and West Virginia.

It must be admitted that there is a wide divergence in the decisions of the State courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the Western and Southern States. But of the three leading cases on that side of the question, Hopkins *v.* Railroad Co., 36 N. H. 9, can hardly be reconciled with the later decisions in Fay *v.* Parker, 53 N. H. 342, and Bixby *v.* Dunlap, 56 N. H. 456; and in Goddard *v.* Railway Co., 57 Maine, 202, 228, and Railway Co. *v.* Dunn, 19 Ohio St. 162, 590, there were strong dissenting opinions. In many, if not most, of the

other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedg. Dam. (8th ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved, or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages; but the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed, and the case remanded to the Circuit Court, with directions to set aside the verdict, and to order a new trial.

CHAPTER III.

LIQUIDATED DAMAGES.

KEMBLE *v.* FARREN.

Common Pleas, 1829. 6 Bing. 141.

TINDAL, C.J.[1] This is a rule which calls upon the defendant to show cause why the verdict, which has been entered for the plaintiff for £750, should not be increased to £1000.

The action was brought upon an agreement made between the plaintiff and the defendant, whereby the defendant agreed to act as a principal comedian at the Theatre Royal, Covent Garden, during the four then next seasons, commencing October, 1828, and also to conform in all things to the usual regulations of the said Theatre Royal, Covent Garden; and the plaintiff agreed to pay the defendant £3 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances, during the next four seasons, and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.

[1] The opinion only is given: it sufficiently states the case.

The breach alleged in the declaration was, that the defendant refused to act during the second season, for which breach, the jury, upon the trial, assessed the damages at £750, which damages the plaintiff contends ought by the terms of the agreement to have been assessed at £1000.

It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of £1000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6*s*. 8*d*. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable, in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those

breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of Astley *v.* Weldon, in which it was stipulated, that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of £200, to be recovered in his Majesty's Courts at Westminster. Here there was a distinct agreement, that the sum stipulated should be liquidated and ascertained damages; there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments; the action was brought for the breach of a clause of an uncertain nature; and yet it was held by the court, that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it, and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it. The consequence is, we think the present verdict should stand, and the rule for increasing the damages be discharged.

Rule discharged.

KEEBLE *v.* KEEBLE.

Alabama, 1888. 85 Ala. 552.

Somerville, J.[1] The appellant was in the employment of the appellee's testator as a business manager, at very liberal wages, having been a partner with him in the mercantile business, under the firm name of R. C. Keeble & Co. Although he was but an employe, having sold to R. C. Keeble his entire

[1] Part of the opinion only is given.

interest in the partnership business, he remained ostensibly a partner. The terms of the employment, reduced to writing, imposed on the appellant, Henry Keeble, the obligation, among other duties, "to wholly abstain from the use of intoxicating liquors," and "to continue and remain sober," giving his diligent attention to the business of his employer, and promising, in the event he should become intoxicated, that he would pay, "as liquidated damages," the sum of $1000, which the testator, Richard Keeble, was authorized to retain out of a certain debt he owed the appellant. The appellant violated his promise by becoming intoxicated, and remained so for a long time, and acted rudely and insultingly towards the customers and employes of the testator, and otherwise deported himself, by reason of intoxication, in such manner as to do injury to the business. It is not denied by appellant's counsel that this is a total breach of the promise to keep sober; nor is it argued that the damage resulting from the violation of such a promise can be ascertained with any degree of certainty; nor even that the amount agreed to be paid as liquidated damages, in the event of a breach, is disproportionate to the damages which may have been actually sustained in this case. But the contention seems to be that, inasmuch as it was possible for a breach to occur with no actual damages other than nominal, the amount agreed to be paid should be construed to be a penalty. Unless this view is correct, the application of the foregoing rules to the construction of the agreement manifestly stamps it as a stipulation for liquidated damages, and not a penalty. It is argued, in other words, that becoming intoxicated in private, while off duty, would be a violation of the contract, but would be attended with no actual damage to the business of R. C. Keeble & Co. This fact would, in our opinion, except the case from the operation of the rules above enunciated. There are but few agreements of this kind where the stipulation is to do or not to do a particular act, in which the damages may not, according to circumstances, vary, on a sliding scale, from nominal damages to a con-

siderable sum. One may sell out the good-will of his business in a given locality, and agree to abstain from its further prosecution, or, in the event of his breach of his agreement, to pay a certain sum as liquidated damages; as, for example, not to practise one's profession as a physician or lawyer, not to run a steamboat on a certain river or to carry on the hotel business in a particular town, not to re-establish a newspaper for a given period, or to carry on a particular branch of business within a certain distance from a named city. In all such cases, as often decided, it is competent for the parties to stipulate for the payment of a gross sum by way of liquidated damages for the violation of the agreement, and for the very reason that such damages are uncertain, fluctuating, and incapable of easy ascertainment. Williams *v.* Vance, 30 Amer. Rep. 29–31, note; Graham *v.* Bickham, 1 Amer. Dec. 336–338, note; 1 Pom. Eq. Jur. § 442, note 1. It is clear that each of these various agreements may be violated by a substantial breach, and yet no damages might accrue except such as are nominal. The obligor may practise medicine, and possibly never interfere with the practice of the other contracting party; or law, without having a paying client; or he may run a steamboat without a passenger; or an hotel without a guest; or carry on a newspaper without the least injury to any competitor. But the law will not enter upon an investigation as to the *quantum* of damages in such cases. This is the very matter settled by the agreement of the parties. If the act agreed not to be done is one from which, in the ordinary course of events, damages, incapable of ascertainment save by conjecture, are liable naturally to follow, sometimes more and sometimes less, according to the aggravation of the act, the court will not stop to investigate the extent of the grievance complained of as a total breach, but will accept the sum agreed on as a proper and just measurement, by way of liquidated damages, unless the real intention of the parties, under the rules above announced, designed it as a penalty. We may add, moreover, that no one can accurately estimate the

physiological relation between private and public drunkenness, nor the causal connection between intoxication one time and a score of times. The latter, in each instance, may follow from the former, and the one may naturally lead to the other. There would seem to be nothing harsh or unreasonable in stipulating against the very source and beginning of the more aggravated evil sought to be avoided. The duty resting on the court, in all these cases, is to so apply the settled rules of construction as to ascertain the legally expressed and real intention of the parties. Courts are under no obligations, nor have they the power, to make a wiser or better contract for either of the parties than he may be supposed to have made for himself. The court below, in our judgment, did not err in holding, as it did, by its rulings, that the sum agreed to be paid the appellee's testator was liquidated damages, and not a penalty.

Affirmed.

SMITH *v.* BERGENGREN.

Massachusetts, 1890. 153 Mass. 236.

Holmes, J.[1] The defendant covenanted never to practise his profession in Gloucester so long as the plaintiff should be in practice there, provided, however, that he should have the right to do so at any time after five years, by paying the plaintiff two thousand dollars, "but not otherwise." This sum of two thousand dollars was not liquidated damages, still less was it a penalty. It was not a sum to be paid in case the defendant broke his contract, and did what he had agreed not to do. It was a price fixed for what the contract permitted him to do if he paid. The defendant expressly covenanted not to return to practice in Gloucester unless he paid this price. It would be against common sense to say that he could avoid the effect of thus having named the sum

[1] Part of the opinion only is given.

by simply returning to practice without paying, and could escape for a less sum if the jury thought the damage done the plaintiff by his competition was less than two thousand dollars. The express covenant imported the further agreement, that if the defendant did return to practice he would pay the price. No technical words are necessary if the intent is fairly to be gathered from the instrument. See Pearson *v.* Williams, 24 Wend. 244, and 26 Wend. 630; Stevinson's Case, 1 Leon. 324; St. Albans *v.* Ellis, 16 East, 352; Deverill *v.* Burnell, L. R. 8 C. P. 475; National Provincial Bank of England *v.* Marshall, 40 Ch. D. 112.

If the sum had been fixed as liquidated damages, the defendant would have been bound to pay it. Cushing *v.* Drew, 97 Mass. 445; Lynde *v.* Thompson, 2 Allen, 456; Holbrook *v.* Tobey, 66 Maine, 410. But this case falls within the language of Lord Mansfield in Lowe *v.* Peers, 4 Burr. 2225, 2229, that if there is a covenant not to plough with a penalty in a lease, a court of equity will relieve against the penalty, "but if it is worded 'to pay £5 an acre for every acre ploughed up,' there is no alternative, no room for any relief against it, no compensation; it is the substance of the agreement." See, also, Ropes *v.* Upton, 125 Mass. 258, 260. The ruling excepted to did the defendant no wrong. In the opinion of a majority of the court, the exceptions must be overruled. *Exceptions overruled.*

TENNESSEE MANUFACTURING CO. *v.* JAMES.

Tennessee, 1892. 91 Tenn. 154.

Plaintiff was an employe of the appellant, a corporation engaged in the manufacture of cotton goods. The contract of employment was in writing; by one of its provisions it was stipulated that the employe should give two weeks' notice of her intention to quit. It is further provided that in case she should leave without giving two weeks' notice, or fail or refuse

faithfully to work during a period of two weeks after giving such notice, then the sum of ten dollars was "agreed upon as liquidated damages due said Tennessee Manufacturing Company at the time of my failure to comply with the terms of this contract, to compensate it for all damages, both actual and exemplary, and all loss, arising from my failure to carry out the terms of this agreement."

Appellee gave notice of her intention to leave, and thereafter worked ten days, but at the end of that time quit without any excuse. At the time she quit there was due her twenty days' wages (amounting to ten dollars), including the ten days after her notice. If the stipulation was invalid, the company owes her ten dollars; if valid, then nothing is due her.[1]

LURTON, J. We agree with the Circuit Judge in holding that this contract does not fall within the case of Schrimpf *v.* Manufacturing Co., 86 Tenn. 219. That case concerned a contract construed as stipulating for a penalty in case of a breach. It was held not to be an agreement for liquidated damages, because the forfeiture covered all the wages due at time of breach, regardless of amount due, and regardless as to whether the arrearages were the consequence of the default of the company. It was a contract hard and unconscionable. It preserved no proportion between the sum forfeited and the actual damages, and put all employes upon same footing, whether much or little was earned, much or little due, when breach occurred. The damages were to be all that was due, in any case. To one this might have been the wages of months; to another, the earnings of but a day. But in that case Chief Justice Turney quoted and indorsed the language of Campbell, J., in Richardson *v.* Woehler, 26 Mich. 90, where he said: "We have no difficulty in holding that the injury caused by the sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated

[1] This statement of facts is condensed from the opinion of LURTON, J. Part of the opinion is omitted.

damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay-day might be forfeited, should be agreed on, and shall not be unreasonable or an oppressive exaction, there would seem to be no legal objection to the stipulation, if both parties are equally and justly protected." Applying these principles to the case for judgment, we have no difficulty in holding that the stipulation here is for liquidated damages, and not for a penalty, and that the contract is neither unreasonable nor oppressive. "The tendency and preference of the law is to regard stated sums as a penalty, because actual damages can then be recovered, and the recovery limited to such damages. This tendency and preference, however, does not exist when the actual damages cannot be ascertained by any standard. A stipulation to liquidate damages in such cases is considered favorably." 1 Suth. Dam. 490. This contract of employment on its face affords no *data* by which the actual damages likely to result from its non-observance can with any certainty be ascertained. Such a circumstance has been regarded as justifying the courts in holding the sum stipulated as liquidated damages.

The plaintiff in error was a cotton-mill, having in its employment hundreds of hands. The work is divided into many departments. The same material is handled by one set of hands, and put in condition for another, and the second department still further advances its manufacture; and so on, through successive stages of progress. The evidence shows that each department is dependent upon that immediately below it. Now, if the operatives of one department quit, or their work is delayed, its effect is felt in all to a greater or less degree. It is also shown that it is not always easy to replace an operative at once, and that the unexpected quitting of even one hand will, to some extent, affect the results throughout the mill. Yet the evidence shows that it would be impossible to calculate with any certainty the precise, actual loss due to an unexpected breach of an employe's engagement; though it is shown that there are some departments of

work where the quitting of a small number of hands, without notice, would stop the entire mill, and throw other hundreds out of employment. In this day of great factories, and the consequent division of labor into separate departments, a degree of interdependence among employes exists, which they ought and do recognize, and which makes the obligation of each to the whole, and to the common employer, all the more important. The case is one, then, where the certainty of some damage, and the uncertainty of means and standards by which the actual damage can be ascertained, requires the courts to uphold the contract as one for liquidated damages, and not as providing for a penalty. The sum fixed is certain. It is proportioned to the earning capacity of the employe, and hence presumably with regard to the particular results of a breach in each department. There is no hardship in the agreement requiring two weeks' notice. If the operative leaves for good cause, the contract would not apply. If able to work, the pay continues until notice has been worked out.

That she returned the next day after quitting, and offered to work out her notice, is no compliance. The mischief had been done. She had voluntarily, and without pretence of excuse, or asking to be released, gone off, and left her work standing, and endeavored to get others to go with her. The damages had accrued, and, under the facts of this case, appellant was not bound to restore her. Reverse. Judgment here for plaintiff in error.

MONMOUTH PARK ASSOC. *v.* WALLIS IRON WORKS.

New Jersey Court of Errors and Appeals, 1893.
55 N. J. L. 132.

DIXON, J.[1] The plaintiff urged that the $100 a day was a penalty; and so the trial judge ruled, requiring that the de-

[1] Only part of the opinion is given. The only part of the contract which is material to the point under discussion is as follows: "In case the

fendant should prove the actual damages and be allowed only for what was proved. To this ruling the defendant excepted.

In determining whether a sum, which contracting parties have declared payable on default in performance of their contract, is to be deemed a penalty or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will, however, be ascertained by considering, not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If, on such consideration, it appears that they have provided for larger damages than the law permits, e. g., more than the legal rate for the non-payment of money, or that they have provided for the same damages on the breach of any one of several stipulations, when the loss resulting from such breaches clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is deemed a penalty. And if it be doubtful on the whole agreement whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors mere indemnity. But when damages are to be sustained by the breach of a single stipu-

said party of the first part shall [fail] to fully and entirely, and in conformity to the provisions and conditions of this agreement, perform and complete the said work, and each and every part and appurtenance thereto, within the time hereinbefore limited for such performance and completion, or within such further time as in accordance with the provisions of this agreement shall be fixed or allowed for such performance and completion, the said party of the first part shall and will pay to the said party of the second part the sum of one hundred dollars for each and every day that they, the said party of the first part, shall be in default, which said sum of one hundred dollars per day is hereby agreed upon, fixed and determined by the parties hereto as the damages which the party of the second part will suffer by reason of such default, and not by way of penalty. And the said party of the second part may and shall deduct and retain the same out of any moneys which may be due or become due to the party of the first part under this agreement."

lation, and they are uncertain in amount and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionated to the presumable loss, it may be recovered as liquidated damages. These are the general principles laid down in the text-books and recognized in the judicial reports of this State. Cheddick's Executor *v.* Marsh, 1 Zab. 463; Whitefield *v.* Levy, 6 Vroom, 149; Hoagland *v.* Segur, 9 Id. 230; Lansing *v.* Dodd, 16 Id. 525.

In the present case the default consists of the breach of a single covenant, to complete the grand stand as described in the approved plans and specifications within the time limited. It is plain that the loss to result from such a breach is not easily ascertainable. The magnitude and importance of the grand stand may be inferred from its cost — $133,000. It formed a necessary part of a very expensive enterprise. The structure was not one that could be said to have a definable rental value. Its worth depended upon the success of the entire venture. How far the non-completion of this edifice might affect that success, and what the profits or losses of the scheme would be, were topics for conjecture only. The conditions therefore seem to have been such as to justify the parties in settling for themselves the measure of compensation.

The stipulations of parties for specified damages, on the breach of a contract to build within a limited time, have frequently been enforced by the courts. In Fletcher *v.* Dycke, 2 T. R. 32, £10 per week for delay in finishing the parish church; in Duckworth *v.* Alison, 1 Mees. & W. 412, £5 per week for delay in completing repairs of a warehouse; in Legge *v.* Harlock, 12 Q. B. 1015, £1 per day for delay in erecting a barn, wagon-shed, and granary; in Law *v.* Local Board of Redditch, (1892) 1 Q. B. 127, £100 and £5 per week for delay in constructing sewerage works; in Ward *v.* Hudson River Building Co., 125 N. Y. 230, $10 a day for delay in erecting dwelling-houses, and in Malone *v.* City of Philadelphia, 23 Atl. Rep. 628, $50 a day for delay in completing a

municipal bridge, were all deemed liquidated damages. Counsel has referred us to two cases of building contracts, where a different conclusion was reached — Muldoon *v.* Lynch, 66 Cal. 536, and Clement *v.* Schuylkill River R. R. Co., 132 Pa. 445. In the former case a statutory rule prevailed, and in the latter the real damage was easily ascertainable and the stipulated sum was unconscionable. In the case at bar, we have no *data* for saying that $100 a day was unconscionable.

The sole question remaining on this exception, therefore, is whether the parties have agreed upon the sum named as liquidated damages.

Their language seems indisputably to have this meaning. They expressly declare the sum to be agreed upon as the damages which the defendant will suffer; they expressly deny that they mean it as a penalty, and they provide for its deduction and retention by the defendant in a mode which could be applied only if the sum be considered liquidated damages.

But it is argued that, as the contract authorized the engineer of the defendant to make any alterations or additions that he might find necessary during the progress of the structure, and required the plaintiff to accede thereto, it is unreasonable to suppose that the plaintiff could have intended to bind itself in liquidated damages for delay in completing such a changeable contract.

But this argument seems to be aside from the present inquiry, which is, not whether the plaintiff became responsible for damages by reason of the non-completion of the grand stand on the day named, but whether, if it did become so responsible, those damages are liquidated by the contract. On the question first stated, changes ordered by the engineer may afford matter for consideration; on the second question, they are irrelevant.

Certainly the bills of exceptions do not indicate any alterations or additions which, as matter of law, would relieve the plaintiff from responsibility for the admitted delay, and

consequently there may have been ground for considering the defendant's damages. If there was, the amount of the damages was adjusted by the contract at $100 per day.

We think the ruling at the Circuit, on this point, was erroneous.

CHAPTER IV.

NOMINAL DAMAGES.

WOOD *v.* WAUD.

Exchequer, 1849. 3 Ex. 748.

POLLOCK, C.B.[1] The fact, as found by the jury, is, that the defendants (whose works have been erected within twenty years, and who have no right, by long enjoyment or grant, so to do) have fouled the water of the natural stream by pouring in soap suds, woolcombers' suds, &c.; but that pollution of the natural stream has done no actual damage to the plaintiffs, because it was already so polluted by similar acts of millowners above the defendants' mills, and by dyers still further up the stream, and some sewers of the town of Bradford; that the wrongful act of the defendants made no practical difference, that is, that the pollution by the defendants did not make it less applicable to useful purposes than such water was before. We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land on which the watercourse flowed, as will be hereafter more fully stated; and that right continues, except so far as it may have been derogated from by user or by grant to the neighboring landowners.

This is a case, therefore, of an injury to a *right*. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the dye-

[1] Part of the opinion only is given.

works and other manufactories, and other sources of pollution above the plaintiffs, should be afterwards discontinued, the plaintiffs, who would otherwise have had, in that case, pure water, would be compellable to submit to this nuisance, which then would do serious damage to them. We think, therefore, that the verdict must be entered for the plaintiffs on every part of not guilty to the first count.[1]

[1] It is said, however, *de minimis non curat lex.* This maxim is never applied to the positive and wrongful invasion of another's property. To warrant an action in such case, says a learned writer, "some temporal damage, be it more or less, must actually have resulted, or *must be likely to ensue.* The degree is wholly immaterial; nor does the law, upon every occasion, require distinct proof that an inconvenience has been sustained. For example, if the hand of A. touch the person of B., who shall declare that pain has or has not ensued? The only mode to render B. secure is to infer that an inconvenience has actually resulted." (Hamm. N. P. 39, Am. ed. of 1823.) "Where a new market is erected near an ancient one, the owner of the ancient market may have an action; and yet, perhaps, the cattle that would have come to the old market might not have been sold, and so no toll would have been gained, and consequently there would have been no real damage; but there is a possibility of damage." (2 Ld. Raym. 948.) In Ashby *v.* White, wherein Powell, J. laid down this rule as to the market, it was held finally by the House of Lords that to hinder a burgess from voting for a member of the House of Commons was a good ground of action. No one could say that he had been actually injured or would be; so far from it, the hindrance might have benefited him. But his franchise had been violated. The owner of a horse might be benefited by a skilful rider taking the horse from the pasture and using him; yet the law would give damages, and, under circumstances, very serious damages, for such an act. The owner of a franchise, as well as of other property, has a right to exclude all persons from doing anything by which it may possibly be injured. The rule is necessary for the general protection of property; and a greater evil could scarcely befall a country than the rule being frittered away or relaxed in the least, under the idea that though an exclusive right be violated, the injury is trifling, or indeed nothing at all. — Cowen, J., in Seneca Road *v.* Auburn and Rochester Railroad, 5 Hill, 170, 175.

HIBBARD *v.* WESTERN UNION TELEGRAPH CO.

Wisconsin, 1873. 33 Wis. 558.

Action to recover damages alleged to have accrued to plaintiffs by reason of defendant's failure to deliver a telegraphic despatch. Trial by the court without a jury. The court held that defendant was guilty of negligence in failing to deliver such message, and became liable to plaintiffs for any damages sustained by them; but that "no injury had been sustained by plaintiffs which the court could compute in damages," and judgment was accordingly entered for defendant. From this judgment the plaintiffs appealed.

Cole, J.[1] It is apparent that in this case there was a technical breach of contract on the part of the company, for which the plaintiffs were entitled to recover nominal damages. But this would be the extent of the recovery. A judgment for nominal damages would not have carried costs, because the action might have been brought in a justice's court. The despatch was to be paid for on delivery in Milwaukee; but, as it was never delivered, the plaintiffs were at no expense for its transmission. And while the County Court was wrong in not rendering judgment for the plaintiffs for nominal damages, yet, in a case like the present, this constitutes no ground for a reversal of the judgment. This point was so ruled in Laubenheimer *v.* Mann, 19 Wis. 515; and the doctrine of that case was approved in Eaton *v.* Lyman, 30 Wis. 41, and in Jones *v.* King, 33 Wis. 422. According to the rule laid down and approved in these decisions, the judgment in the present case must be affirmed.

By the Court. — It is so ordered.

[1] Part of the opinion is omitted.

LEEDS *v.* METROPOLITAN GAS-LIGHT CO.

New York, 1882. 90 N. Y. 26.

FINCH, J. We think there was error in the mode of submitting to the jury the question of damages. Whether there was any evidence of negligence on the part of the defendant company upon which the verdict can rest, has been the principal controversy on the appeal, but need not be decided, since upon the new trial which must result the facts may be entirely different. If the evidence is insufficient now, it is possible that it may be made sufficient then.

The plaintiff was injured by an explosion of gas in the cellar or vault of the house occupied by him, and which had escaped from a break in the defendant's main. The character of his injuries was described by the evidence, and among other things it was proved that he was engaged in business at the time of the injury, but had not been able to attend to business since. It was not shown what his business was, or the value of his time, or any facts as to his occupation from which that value could be estimated. The jury were left to guess or speculate upon this value without any basis for their judgment, so far as loss of time was an element of the damages awarded. The court charged that the plaintiff, if entitled to a verdict, was "entitled to recover compensation for the time lost in consequence of confinement to the house, or in consequence of his disability to labor from the injury sustained." The defendant's counsel excepted to this portion of the charge, assigning as a reason or ground of the exception, that there was no proof in the case of the value of such time. The answer made on behalf of the plaintiff is a criticism on the form of the exception. It is said that "as the defendant's counsel did not ask the court to instruct the jury that there was no evidence of the value of plaintiff's time, the only question here raised is whether the proposition charged is law." It was not necessary to make that request. The

court had charged, in a case where no value of lost time had been shown, and no facts on which an estimate of such value could be founded, that compensation for such lost time could be awarded by the jury. The exception was aimed at that precise proposition, and the ground upon which it was claimed to be erroneous was definitely pointed out. The charge, therefore, can only be defended upon two grounds: either, that evidence of the value of the lost time was given, or, if not, that the jury were at liberty to guess at and speculate upon that value, and estimate it as they pleased. The first ground we have shown to be untenable, and the exception consequently requires us to determine the second. In very numerous actions for negligence, both those where death had resulted and which were prosecuted under the statute, and those for injuries not resulting in death, evidence showing the occupation or business of the injured party and tending to establish his earning power has been held competent and material. (Grant *v.* City of Brooklyn, 41 Barb. 384; Masterton *v.* Village of Mount Vernon, 58 N. Y. 391; Beisiegel *v.* N. Y. Central R. R. Co., 40 Id. 10.) And that is so because the element of damages which consists of lost time is purely a pecuniary loss or injury, and for such only fair and just compensation must be given, and the jury have no arbitrary discretion, but must be governed by the weight of evidence. (McIntyre *v.* N. Y. Central R. R. Co., 37 N. Y. 289.) The rule of recovery is compensation. Where the loss is pecuniary and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only. (Sedgwick on Damages, chap. 2, p. 47; Brantingham *v.* Fay, 1 Johns. Cas. 264; N. Y. Dry Dock Co. *v.* McIntosh, 5 Hill, 290.) In the present case the jury knew simply that time was lost by reason of incapacity to labor. They were bound to consider it of some value, but could not go beyond nominal damages, and give compensation for it upon an arbitrary standard of their own. This they were permitted to do. Without proof of the extent or

character of the plaintiff's pecuniary loss, they were left to fix it as they pleased. Among the elements of damage in cases of injury for negligence, is the cost of the cure, the bills and expenses of medical attendance. Suppose that the bare fact was shown that the deceased had a doctor, but the length of his attendance was not given, the amount of his charges not shown, would it do to permit the jury to give compensation for the cost of the cure upon their own guess or speculation as to its amount? For pain and suffering, or injuries to the feelings, there can be no measure of compensation, save the arbitrary judgment of a jury. But that is a rule of necessity. Where actual pecuniary damages are sought, some evidence must be given showing their existence and extent. If that is not done, the jury cannot indulge in an arbitrary estimate of their own.

The judgment should be reversed, a new trial granted, costs to abide the event.

Judgment reversed.

CHAPTER V.

DIRECT AND CONSEQUENTIAL DAMAGES.

KENRIG *v.* EGGLESTON.

King's Bench, 1648. Aleyn, 93.

In an action upon the case against a country carrier for not delivering a box with goods and money in it, the evidence was, that the plaintiff delivered the box to the carrier's porter, whom he appointed to receive goods for him, and told the porter that there was a book and tobacco in the box; and in truth there was a hundred pounds in it besides. And it was agreed by the counsel, and given in charge to the jury, that if a box with money in it be delivered to a carrier, he is bound to answer for it if he be robbed, although it was not told him what was in it. And so it was ruled in one Barcroft's Case, as Rolle [C.J.] said, where a box of jewels was delivered to a ferryman, who knowing not what was in it, and being in a tempest, threw it overboard into the sea; and resolved that he should answer for it.

Rolle directed, that although the plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it; for he need not tell the carrier all the particulars in the box; but it must come on the carrier's part to make a special acceptance. But in respect of the intended cheat to the carrier he told the jury they might consider him in damages; notwithstanding, the jury gave £97 against the carrier for the money only (the other things being of no considerable value), abating £3 only for carriage. *Quod durum videbatur circumstantibus.*

TICE *v.* MUNN.

New York, 1883. 94 N. Y. 621.

FINCH, J. The defendant asked the court to charge in substance, that if the plaintiff was in an unhealthy and debilitated condition, and the injuries were more serious and lasting by reason of her bodily condition, then the defendant is only liable for such consequences of the injury as would have resulted if she had been in good bodily health. The court refused to charge as requested, but stated the rule to be, that if by reason of a delicate condition of health, the consequences of a negligent injury are more serious still, for those consequences the defendant is liable, although they are aggravated by the imperfect bodily condition. To the refusal and the charge the defendant excepted. There was nothing in the case to call for the instruction sought. The proof utterly failed to show any weakened or imperfect bodily condition which aggravated the injury. What was suggested as a rheumatic attack two years before, proved to have been not such, and of no practical importance, and the court was asked to charge upon an abstract proposition having no just bearing on the case. But the charge was right. Taken in connection with the rule of damages several times repeated, it amounted to saying that the negligent party is responsible for the proximate consequences of his act, even though those consequences are more severe and aggravated by reason of delicate health than they would have been if the sufferer had been sound and well. This does not allow damages for what the defendant did not proximately cause, but holds him responsible for such consequences in the particular case.

MANN BOUDOIR CAR CO. *v.* DUPRE.

U. S. Circuit Court of Appeals, Fifth Circuit, 1893. 54 Fed. 646.

Action by Florence C. Dupre against the Mann Boudoir Car Company to recover damages for illegal expulsion from the berth of a sleeping-car. The Circuit Court gave judgment for plaintiff. Defendant brings error.

McCormick, Circ. J.[1] The plaintiff in error's second proposition rests on the theory that, unless it was apparent to a casual observer that Mrs. Dupre was *enceinte*, or that fact was made known to the servants of the company, she could not recover damages for her subsequent miscarriage, though the jury might believe from the evidence the miscarriage was proximately caused by the unlawful conduct of the company's servants in expelling her from the train. This theory, and the requested charge embodying it, would require every pregnant woman to refrain from travel; to take all the risks of the negligence of public carriers; or to proclaim her condition to the servants of the carriers. We are not willing to sanction by our authority a rule that would so shock the delicacy, dignity, and sense of justice of our "honorable women not a few." The subject called for careful direction of the jury in order to exclude damages too remote; that is, such as were suffered from the action of some intervening cause, or contributed to by the negligence of the plaintiff below. Where, however, the proof satisfactorily shows that the misconduct of the carrier's servant to her while she was a passenger in the carrier's car was the proximate cause of such an injury to a married woman, the carrier should not be held exempt from liability on account of the fact that her condition was unknown to the servants of the company. We therefore do not sustain the second proposition of the plaintiff in error.

[1] Part of the opinion is omitted.

VOSBURG *v.* PUTNEY.

Wisconsin, 1891. 80 Wis. 523.

The plaintiff was about fourteen years of age, and the defendant about eleven years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of the tibia an inch below the bend of the knee. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and the swelling so increased by the 5th day of March that counsel was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the sixth day after this, another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow. On the first day of January before, the plaintiff received an injury just above the knee of the same leg by coasting, which appeared to be healing up and drying down at the time of the last injury. The theory of at

least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revivified by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff's injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant's foot, or any appearance of injury until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff.[1]

Lyon, J. Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in Brown *v.* Railway Co., 54 Wis. 342, to be that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The Chief Justice and the writer of this opinion dissented from the judgment in that case, chiefly because we were of the opinion that the complaint stated a cause of action *ex contractu*, and not *ex delicto*, and hence that a different rule of damages — the rule here contended for — was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages.

[1] This statement of the case is taken from the opinion of Orton, J., on a former appeal in the same case, 78 Wis. 84. Part of the opinion of Lyon, J., is omitted.

ANONYMOUS.

Huntingdon Assizes, 1367. 42 Lib. Assis. pl. 19.

Before Kirketon, Serg., and Fincheden, J., an appeal of robbery was sued in Huntingdon against one who came and was acquitted; and he prayed that they should be asked as to his damages, and as to abettors. And inquisition was made, and twenty shillings damages were found for the defendant. And because it was known to the court that the appellee was for a long time in prison he moved that the damages be increased by the court. And this matter was sent to Knivet, C.J., to get his opinion. He said that in such a case when the inquest had taxed the damages, the court could not alter it; for it was the fault of the justices that they would not take inquest at the first day for such general deliveries, even though no panel was returned; for they should compel the sheriff to make a panel on the spot, from the people, both strangers and inhabitants, there present, &c.

KENT *v.* KELWAY.

Exchequer Chamber, 1610. Lane, 70.

In the case between Kent and Kelway, which was debated Pasch. 8 Jac., the judges pronounced in the Exchequer Chamber, that judgment ought to be affirmed, notwithstanding their opinion before to the contrary as it appeareth, and therefore I demanded of Mr. *Hoopwel*, Clerk of the Errors, what was the reason of their opinions; and he told me that the case was debated by them this term at Sergeants' Inn, and then they resolved to affirm the judgment; and the reasons as he remembered were as followeth, and he also delivered unto me the case, as he had collected it out of the records, and delivered it to the judges, which was, that the

plaintiff in the King's Bench declared that one Benjamin Shephard was indebted to him in £300, and that he sued out of the King's Bench an *alias capias* directed to the sheriff of N. to the intent to compel the said Benjamin Shephard upon his appearance to put in bail, according to the custom of that court, for the recovery of his debt, which writ was delivered to John Shaw, sheriff of the said county, to be executed. The sheriff made his warrant to the bailiff of the liberty of the Wapentake of Newark, and the plaintiff himself delivered it to James Lawton, deputy of the Lord Burleigh, the King's chief bailiff of that liberty, to be executed, and the deputy bailiff by virtue of the said warrant arrested the said Benjamin Shephard, whereupon the defendant with others made an assault and rescued the said Benjamin Shephard out of the custody of the said deputy bailiff, whereby he lost all his debt, and damages were assessed at £172, and costs £10.

And in this case the judges agreed, that notwithstanding the defendant had rescued the said Benjamin Shephard out of the hands of, &c., when the said Benjamin Shephard was arrested upon an *alias capias* out of the King's Bench, which writ is only in nature of a plea of trespass, yet the party who rescued him shall answer in this action, damages for the debt, because the plaintiff by this means had lost his debt. And yet it is not showed that the rescuer knew that the plaintiff would declare for his debt, but if in this case the sheriff or bailiff had suffered a negligent escape, they should be charged only with the damages in the same plea as the writ supposeth, and not for the debt; and so a diversity.[1]

GUILLE *v.* SWAN.

New York, 1822. 19 Johns. 381.

In error, on *certiorari*, to the Justices' Court in the city of New York. Swan sued Guille in the Justices' Court. in an action of trespass, for entering his close, and treading

[1] The remainder of the case is omitted.

down his roots and vegetables, &c., in a garden in the city of New York. The facts were, that Guille ascended in a balloon in the vicinity of Swan's garden, and descended into his garden. When he descended, his body was hanging out of the car of the balloon in a very perilous situation, and he called to a person at work in Swan's field, to help him, in a voice audible to the pursuing crowd. After the balloon descended, it dragged along over potatoes and radishes, about thirty feet, when Guille was taken out. The balloon was carried to a barn at the farther end of the premises. When the balloon descended, more than two hundred persons broke into Swan's garden through the fences, and came on his premises, beating down his vegetables and flowers. The damage done by Guille, with his balloon, was about fifteen dollars, but the crowd did much more. The plaintiff's damages, in all, amounted to ninety dollars. It was contended before the Justice, that Guille was answerable only for the damage done by himself, and not for the damage done by the crowd. The Justice was of the opinion, and so instructed the jury, that the defendant was answerable for all the damages done to the plaintiff. The jury, accordingly, found a verdict for him, for 90 dollars, on which the judgment was given, and for costs.

The cause was submitted to the court on the return, with the briefs of the counsel, stating the points and authorities.

SPENCER, C.J., delivered the opinion of the court. The counsel for the plaintiff in error supposes, that the injury committed by his client was involuntary, and that done by the crowd was voluntary, and that, therefore, there was no union of intent; and that, upon the same principle which would render Guille answerable for the acts of the crowd, in treading down and destroying the vegetables and flowers of S., he would be responsible for a battery, or a murder committed on the owner of the premises.

The intent with which an act is done, is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional

or unintentional, trespass is the proper action to redress the wrong. It was so decided, upon a review of all the cases, in Percival *v.* Hickey, 18 Johns. Rep. 257. Where an immediate act is done by the co-operation or the joint act of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear, either that they acted in concert, or that the act of the individual sought to be charged, ordinarily and naturally, produced the acts of the others. The case of Scott *v.* Shepherd, 2 Black. Rep. 892, is a strong instance of the responsibility of an individual who was the first, though not the immediate, agent in producing an injury. Shepherd threw a lighted squib, composed of gunpowder, into a market house, where a large concourse of people were assembled; it fell on the standing of Y., and to prevent injury, it was thrown off his standing, across the market, when it fell on another standing; from thence, to save the goods of the owner, it was thrown to another part of the market house, and in so throwing it, it struck the plaintiff in the face, and, bursting, put out one of his eyes. It was decided, by the opinions of three judges against one, that Shepherd was answerable in an action of trespass, and assault and battery. De Grey, C.J., held, that throwing the squib was an unlawful act, and that whatever mischief followed, the person throwing it was the author of the mischief. All that was done subsequent to the original throwing, was a continuation of the first force and first act. Any innocent person removing the danger from himself was justifiable; the blame lights upon the first thrower; the new direction and new force flow out of the first force. He laid it down as a principle, that every one who does an unlawful act, is considered as the doer of all that follows. A person breaking a horse in Lincolns-Inn-Fields, hurt a man, and it was held that trespass would lie. In Leame *v.* Bray, 3 East Rep. 595, Lord Ellenborough said, If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave

to hazard what may happen, and mischief ensue, I am answerable in trespass; and if one (he says) put an animal or carriage in motion, which causes an immediate injury to another, he is the actor, the *causa causans.*

I will not say that ascending in a balloon is an unlawful act, for it is not so; but it is certain that the aeronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would, ordinarily and naturally, draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation, — all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help, or not, is immaterial; he had put himself in a situation to invite help, and they rushed forward, impelled, perhaps, by the double motive of rendering aid, and gratifying a curiosity which he had excited. Can it be doubted, that if the plaintiff in error had beckoned to the crowd to come to his assistance, that he would be liable for their trespass in entering the enclosure? I think not. In that case, they would have been co-trespassers, and we must consider the situation in which he placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd; he is, therefore, undoubtedly, liable for all the injury sustained. *Judgment affirmed.*

BROWN *v.* CUMMINGS.

Massachusetts, 1863. 7 All. 507.

Tort for an assault and battery, with an allegation that by reason thereof the plaintiff lost a position as surgeon's mate in the navy, to which he was about to be appointed.

At the trial in the Superior Court, before Ames, J., the plaintiff was permitted, against the defendant's objection, to testify that before the assault and battery complained of he had made an application for the position of surgeon's mate; but that, being disabled by the assault and battery, for that reason he had soon afterwards withdrawn his application. He made no further attempt to show that he had lost the situation, and this evidence was not afterwards referred to by the counsel of either party, or by the court. The evidence of the plaintiff tended to show that the assault was of an unprovoked and aggravated character; and the defence proceeded wholly on the ground that the evidence on which the plaintiff relied was untrue, and that the defendant had committed no assault and battery whatever.

The jury returned a verdict for the plaintiff, with damages in the sum of $100; and the defendant alleged exceptions.

N. Morse, for the defendant.

P. P. Todd, for the plaintiff.

CHAPMAN, J. The question presented by the bill of exceptions is, whether the evidence objected to ought to have been rejected. If the plaintiff had a right, under his declaration, to prove the loss of the office of surgeon's mate as consequential damages, then the evidence was properly admitted; because it was pertinent evidence on that point, though it was obviously insufficient without proof of additional facts.

The rule of law is, that where special damages are not alleged in the declaration, the plaintiff can prove only such damages as are the necessary as well as proximate result of the act complained of; but where they are alleged, they may be proved so far as they are the proximate, though not the necessary result. 1 Chit. Pl. (6th ed.) 441. 2 Greenl. Ev. § 256. Dickinson *v.* Boyle, 17 Pick. 78. As the declaration in this case alleges the loss of the office as special damage, the evidence was admissible, if the loss can be regarded as a proximate result of the assault and battery. So far as we have been able to find authorities on the point (for none were cited on behalf of the plaintiff), they tend to show that

it was not proximate, but remote. In Boyce *v.* Bayliffe, 1 Camp. 58, it is said to have been held that, in an action for false imprisonment, with an allegation that the plaintiff thereby lost a lieutenancy, he could not recover for the loss because it was remote. In 1 Chit. Pl. 410, the same rule of law is stated. In Moore *v.* Adam, 2 Chit. R. 198, which was an action for assault and battery, with an allegation of special damage, the plaintiff offered to prove that, in consequence of the blows given to him by the defendant, he had been driven from Alicant, where he had before carried on trade as a merchant. This was held to be too remote.

These authorities seem to us to be in conformity with the principle stated above. We do not see how the loss of an office can be proximately connected with an assault and battery as its cause. There must be intervening events which make the connection more or less remote; and it is difficult to see how the result can happen without the addition of independent causes also. It is somewhat like the case of a merchant who should offer to prove that, in consequence of an assault and battery, he was unable to go to his store, and thereby lost the opportunity to close a particular bargain which would have been profitable; or of a farmer who should offer to prove that in consequence of such an act he was unable to gather in his crop of grain, and thereby lost it. In the present case, one of the intervening causes of the loss of the office appears to have been a voluntary act of the plaintiff's own will, and there must also have been the concurrent voluntary acts of other men. The evidence ought therefore to have been excluded.

Although this evidence was not noticed by counsel on either side in addressing the jury, or by the court in instructing them, yet it is impossible to know that it had no effect upon their verdict. After it had been admitted, against the objection of the defendant's counsel, the jury had a right to regard it as legal and material, unless they were afterwards instructed to disregard it.

Exceptions sustained.

DUBUQUE WOOD AND COAL ASSOC. *v.* DUBUQUE.

Iowa, 1870. 30 Ia. 176.

Action at law. The petition avers, that, prior to the date when plaintiff's cause of action accrued, there had been erected and maintained a bridge on Seventh Street in the city of Dubuque over a slough of the Mississippi River; that Seventh Street was a highway leading from the business portion of the city to the levee upon the river, and, as such, was used by the public; that said bridge was a county bridge, and it was the duty of the city as well as the county to rebuild it after it became impassable; that before the bridge became impassable, a large quantity of wood being deposited upon the levee, as was customary, was purchased by plaintiff for the purpose of reselling to its customers in the city of Dubuque; that the levee was liable to be overflowed by the river, and the street upon which the bridge in question was erected was the only way over which the wood could have been transported to plaintiff's customers. On account of the bridge becoming impassable, and of the negligence of defendants, in failing to rebuild it, plaintiff was unable to remove his wood. Subsequently, but prior to any repairs made upon the bridge, the wood was lost by a flood in the river. The defendants provided no other bridge or way, while the bridge in question was unfit for use, by which plaintiff could have removed the wood.

The defendants separately demurred to the petition, alleging that it exhibited no cause of action, and each claiming not to be liable upon the state of facts set out in the petition. The demurrers were sustained and plaintiff appeals.

Beck, J. It is not denied, by the appellees, that the injury complained of will support an action, unless the injury appears to be public in its nature, and the damage claimed too remote, under the rules of the law, to become the basis of a

compensatory judgment. The liability of the county and city for damage, the direct and certain result of negligence in failing to repair a highway, when that duty is imposed upon them, is not questioned by the counsel of appellees.

The questions presented for our determination, in this case, are these: 1. Are the injuries set out in the petition, as the foundation of the action, of such a public nature, being shared by plaintiff with the public generally, that recovery therefor is precluded? 2. Is the damage claimed so remote that compensation, under the rules of the law, will not be given? 3. If the action can be maintained, may recovery be had against both of the defendants? If not against both, which one is liable? No other points are presented in the argument of counsel for our decision.

As our conclusions upon the second point above stated are decisive of the case, it will be unnecessary to examine the others.

The rule limiting the recovery of damage to "the natural and proximate consequence of the act complained of" is universally admitted, and the extreme difficulty in its practical application is quite as widely conceded. The difficulty results not from any defect in the rule, but in applying a principle, stated in such general language, to cases of diverse facts. The dividing line between proximate and remote damages is so indistinct, if not often quite invisible, that there is, on either side, a vast field of doubtful and disputed ground. In exploring this ground there is to be had but little aid from the light of adjudicated cases. The course followed in each case, which is declared to be upon one side or the other of the dividing line, is plainly marked out, but no undisputed landmarks are established by which the dividing line itself may be precisely traced. As so little aid is derived from precedents in arriving at the conclusion we have reached, it would prove quite useless to refer to them.

Damage to be recoverable must be the proximate consequence of the act complained of; that is, it must be the consequence that follows the act, and not the secondary re-

sult from the first consequence, either alone or in combination with other circumstances.

An illustration will serve the purpose of more clearly expressing the principle. An owner of lumber deposited upon the levee of the city of Dubuque, exposed to the floods of the river, starts with his team to remove it. A bridge built by the city which he attempts to cross, from defects therein falls, and his horses are killed. By the breaking of the bridge and the loss of his team, he is delayed in removing his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses. The secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which, finally, caused its loss. Damage on account of the first is recoverable, but for the second, is denied.

Applying these principles to the case before us, we conclude that the losses for which recovery is sought were not the proximate consequence of the negligence of defendants complained of in the petition. The proximate consequence of the bridge of defendants becoming impassable was not the loss of plaintiff's wood. The loss resulted from the flood. It does not appear from the petition that the negligence of defendants in failing to repair the bridge, whereby plaintiff was prevented removing the wood, exposed plaintiff to any other loss. All that can be said is, that defendants' negligence caused plaintiff to delay removing the wood; the delay exposed the wood to the flood, whereby it was lost. Plaintiff's damage, then, was not the proximate consequence of the acts of defendant complained of, but resulting from a remote consequence joined with another circumstance, the flood. The case is not distinguishable from the supposed case above stated.

In our opinion the demurrer was correctly sustained. The other points raised in the case need not be noticed.

Affirmed.

EHRGOTT *v.* MAYOR OF NEW YORK.

New York, 1884. 96 N. Y. 264.

EARL, J.[1] This action was commenced to recover damages sustained by the plaintiff from personal injuries received by him in consequence of a defect in a street in the city of New York. The accident occurred in the night time, while it was raining. When the plaintiff drove into the ditch in the street his horses jumped, the axle of his carriage was broken, and he was dragged partly over the dash-board. With the assistance of men who came to his help, his horses were taken from the carriage, and he procured another carriage and harnessed his horses to that, and drove several miles to his home with his wife, sister, and son. To report the accident to the police station near by, to change carriages, and drive to his home, took several hours, and during that time he was exposed to the cold and rain, and his clothes became perfectly saturated with water. He was not that night aware that he had sustained any injury, and the next morning first became sensible of the pain in his back. Upon the trial the plaintiff gave evidence tending to show that the diseases from which he was suffering were results of the strain and shock, caused by his being dragged over the dash-board; and the defendant gave evidence tending to show that the diseases were the result of the subsequent exposure to the cold and rain. . .

The defendant requested the judge to charge "that the spinal injuries from which the plaintiff now suffers, if they were occasioned by the exposure to the wet, following the accident, as the defendant contends they were, are not the natural and necessary result of the accident, and are not such as might reasonably be supposed to have been in the contemplation of the parties as the probable outgrowth of the accident, and, therefore, in the contemplation of the law, the

[1] Part of the opinion is omitted.

defendant is not liable therefor." The judge declined to charge this, except as he had already charged, and the defendant's counsel excepted. . . .

It is sometimes said that a party charged with a tort, or with breach of contract, is liable for such damages as may reasonably be supposed to have been in the contemplation of both parties at the time, or with such damage as may reasonably be expected to result, under ordinary circumstances, from the misconduct, or with such damages as ought to have been foreseen or expected in the light of the attending circumstances, or in the ordinary course of things. These various modes of stating the rule are all apt to be misleading, and in most cases are absolutely worthless as guides to the jury. (Leonard *v.* N. Y., &c., Tel. Co., 41 N. Y. 544.) Parties, when they make contracts, usually contemplate their performance and not their breach, and the consequences of a breach are not usually in their minds, and it is useless to adopt a fiction in any case that they were. When a party commits a tort resulting in a personal injury, he cannot foresee or contemplate the consequences of his tortious act. He may knock a man down, and his stroke may, months after, end in paralysis or in death, — results which no one anticipated or could have foreseen. A city may leave a street out of repair, and no one can anticipate the possible accidents which may happen, or the injuries which may be caused. Here, nothing short of Omniscience could have foreseen for a minute what the result and effect of driving into this ditch would be. Even for weeks and months after the accident the most expert physicians could not tell the extent of the injuries.

The true rule, broadly stated, is that a wrong-doer is liable for the damages which he causes by his misconduct. But this rule must be practicable and reasonable, and hence it has its limitations. A rule to be of practicable value in the administration of the law, must be reasonably certain. It is impossible to trace any wrong to all its consequences. They may be connected together and involved in an infinite con-

catenation of circumstances. As said by Lord Bacon, in one of his maxims (Bac. Max. Reg. 1): "It were infinite for the law to judge the cause of causes, and their impulsion one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." The best statement of the rule is that a wrong-doer is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury. (Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469.) We are, therefore, of opinion that the judge did not err in refusing to charge the jury that the defendant was liable "only for such damages as might reasonably be supposed to have been in the contemplation of the plaintiff and defendant as the probable result of the accident."

PENNSYLVANIA RAILROAD v. WABASH, ST. LOUIS & PACIFIC RAILWAY.

United States Supreme Court, 1895. 157 U. S. 225.

HARLAN, J.[1] On the 7th day of December, 1880, the Wabash, St. Louis & Pacific Railway Company, by its agent at Omaha, Neb., sold to one W. J. Connell a railroad coupon ticket, purporting to be good to the holder for passage over certain railroads extending from Omaha to the city of New York, one of which was the road belonging to the Pennsylvania Railroad Company, and extending from Philadelphia to New York.

It is to be taken upon this record that the Wabash Company had no authority to sell a ticket entitling the holder to passage over the appellant's road between Philadelphia and New York. Indeed, the Wabash Company had notice that the Pennsylvania Company would not recognize any tickets sold by it.

In the course of his journey to the East, Connell took pas-

[1] Part of the opinion is omitted.

sage at Philadelphia on one of the appellant's trains for New York. Being asked by the conductor for his ticket, he presented the Philadelphia-New York coupon of the ticket purchased at Omaha. The conductor, in conformity with instructions from appellant, refused to accept that coupon in payment of fare. Connell refused to make payment otherwise than with the coupon so tendered by him, and, because of such refusal, was ejected by appellant's conductor from the train, and left at a way station.

Connell subsequently sued the Pennsylvania Railroad Company in the superior court of Cook County to recover damages on account of his expulsion from the train of that company.

In a suit in which all the property and assets of the Wabash Company in Illinois were in course of administration, and were in the possession of the court, the Pennsylvania Railroad Company filed intervening petitions and asked an order directing the receivers to pay the sums reasonably expended by it in and about the defence of the action brought by Connell. . . .

We are clearly of opinion that no such liability existed. The Pennsylvania Company had in its hands a simple remedy for the wrongful sale by the Wabash Company of a ticket over its road from Philadelphia to New York; namely, to refuse to recognize that ticket by whomsoever presented. It applied that remedy, for it declined to accept the coupon tendered by Connell, and stood upon its undoubted right to demand money for his fare. As between the two railroad companies, this closed the matter in respect to the unauthorized sale by the Wabash Company of a ticket for passage over the Pennsylvania road. The ejection of Connell by the Pennsylvania Company from the train — particularly if such ejection was accompanied by unnecessary force — was upon its own responsibility, and was not made legally necessary by anything done by the Wabash Company which the other company was bound to recognize or respect. It had no direct connection with the wrong of the Wabash Company in selling a ticket over the road of the Pennsylvania Company.

HADLEY *v.* BAXENDALE.

Exchequer, 1854. 9 Ex. 341.

This was an action by the plaintiffs, owners of a steam grist-mill, against the defendant, a carrier, for delay in delivering two pieces of iron, being the broken shaft of the mill of the plaintiffs, by reason of which delay the engineer to whom they were to be delivered was unable to supply a new shaft, and the mill of the plaintiffs was stopped, and the plaintiffs lost certain profits by the delay of their business, which was laid in the declaration as special damage. The defendant paid £25 into court.

At the trial, before Crompton, J., at the Summer Assizes for Gloucester, 1853, it appeared that the broken shaft was to be sent to the engineer as a model for a new one, and at the time of the contract for the carriage being made, the defendant's clerk was informed that the mill was stopped and that the shaft must be sent immediately. It further appeared that its delivery at its destination was delayed for several days, and, consequently, the plaintiffs did not receive the new shaft back as they expected, and their mill was kept idle. The learned judge left the question of damages to the jury, although it was objected that the special damage was too remote, and they gave a verdict for the plaintiffs for £25 beyond the sum paid into court.

A rule *nisi* for a new trial for misdirection was obtained in Michaelmas term, on the ground that the learned judge ought to have told the jury to throw out of their consideration the alleged special damage.[1]

Alderson, B. We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the

[1] This statement of the case is taken from the report in 23 L J. (N.S.) Ex. 179.

judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on several occasions; and, in Blake *v.* Midland Railway Company, 21 L. J., Q. B., 237, the court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at Nisi Prius.

"There are certain established rules," this court says, in Alder *v.* Keighley, 15 M. & W. 117, "according to which the jury ought to find." And the court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by

any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of

the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case. *Rule absolute.*

CORY *v.* THAMES IRONWORKS & SHIPBUILDING COMPANY.

Queen's Bench, 1868. L. R. 3 Q. B. 181.

This was an issue directed by the Court of Chancery under 8 & 9 Vict. c. 109, to ascertain the amount of damages to which the plaintiffs were entitled, *inter alia*, by reason of the delay by the defendants in the delivery of the hull of a floating-boom derrick, under a contract of sale.

At the trial before Shee, J., at the sittings in London, after Hilary Term, 1864, a verdict was taken for the plaintiffs, subject to a case to be stated by an arbitrator.

The plaintiffs are coal merchants and shipowners, having a very large import trade in coal from Newcastle and other places into the port of London. The defendants are iron manufacturers and shipbuilders in London.

The plaintiffs had introduced, at the docks where they discharged the cargoes of coal from their ships, a new and expeditious mode of unloading the coals by means of iron buckets, which were worked by hydraulic pressure over powerful cranes, and the plaintiffs' trade having considerably increased, they were desirous of improving the accommodation offered in the discharge of their vessels by the above mode; this the defendants were not aware of.

The defendants agreed to sell the plaintiffs a floating-boom derrick, and to deliver it before the 1st of January, 1862. The plaintiffs purchased the derrick for the purposes of their business, in order to erect and place in it, as they in fact did, large hydraulic cranes and machinery, such as they had previously used at the docks, and by means of these cranes to tranship their coals from colliers into barges without the necessity for any intermediate landing, the derrick, for this purpose, being moored in the river Thames, and the plaintiffs paying the conservators of the river a large rent for allowing it to remain there.

The derrick was the first vessel of the kind that had ever been built in this country, and the purpose to which the plaintiffs sought to apply it was entirely novel and exceptional. No hull or other vessel had ever been fitted either by coal merchants or others in a similar way or for a similar purpose; and the defendants at the date of the agreement had notice that the plaintiffs purchased the derrick for the purpose of their business, considering that it was intended to be used as a coal store; but they had no notice or knowledge of the special object for which it was purchased, and to which it was actually applied.

At the date of the agreement the defendants believed that the plaintiffs were purchasing the derrick for the purpose of using her in the way of their business as a coal store; but the plaintiffs had not at that time any intention of applying

the derrick to any other purpose than the special purpose to which she was in fact afterwards applied.

If the plaintiffs had been prevented from applying the derrick to the special purpose for which she was purchased, and to which she was applied, they would have endeavored to sell her to persons in the hulk trade as a hulk for storing coals, and had they been unable to sell her, they could and would have employed her in that trade and in that way themselves; that was the most obvious use to which such a vessel was capable of being applied by persons in the plaintiffs' business; but the hulk trade is a distinct branch of the coal trade, and neither formed nor forms any part of the business carried on by the plaintiffs; and the derrick being an entirely novel and exceptional vessel and the first of the kind built, no vessel of the sort had ever been applied to such a purpose. The derrick was, however, capable of being applied to and profitably employed for that purpose, and had she been purchased for that purpose her non-delivery at the time fixed by the agreement would have occasioned loss and damage to the plaintiffs to the amount of £420.

The defendants did not deliver the derrick to the plaintiffs until the 1st of July, 1862. If the defendants had delivered the hull to the plaintiffs in proper time, the plaintiffs would have realized large profits by the use of it in the aforesaid manner, and they were put to great inconvenience and sustained great loss owing to their not having possession of the hull to meet the great increase in their trade.

The plaintiffs also lost £8 15*s.* for interest upon the portion of the purchase-money of the hull paid by them to the defendants before delivery.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover against the defendants the whole or any, and which of the above heads of damage.[1]

J. C. Brown, Q.C. (Watkin Williams with him) for the plaintiffs.[2]

[1] This statement of facts has been somewhat abridged.

[2] The argument for the plaintiffs is omitted.

J. D. Coleridge, Q.C. (Garth, Q.C., and Philbrick with him) for the defendants.[1] No doubt the plaintiffs are entitled to the interest; but they are not entitled to the £420. This sum is the damages resulting from a special purpose, within the principle of Hadley *v.* Baxendale. The rule laid down in Hadley *v.* Baxendale is that the plaintiff can only recover such damages as are the natural result of the breach of contract in ordinary circumstances, or, — which would appear to be another mode of expressing the same thing, — what were in the contemplation of both parties at the time of the contract.

[BLACKBURN, J. The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of.]

[COCKBURN, C.J. No doubt, in order to recover damage arising from a special purpose the buyer must have communicated the special purpose to the seller; but there is one thing which must always be in the knowledge of both parties, which is, that the thing is bought for the purpose of being in some way or other profitably applied.]

But it [the use to which the defendants supposed the hull was intended to be applied] is a use totally distinct from that to which the plaintiffs applied and intended to apply it.

[COCKBURN, C.J. The two parties certainly had not in their common contemplation the application of this vessel to any one specific purpose. The plaintiffs intended to apply it in their trade, but to the special purpose of transhipping coals; the defendants believed that the plaintiffs would apply it to the purpose of their trade, but as a coal store. I cannot, however, assent to the proposition that, because the seller does not know the purpose to which the buyer intends to apply the thing bought, but believes that the buyer is going to apply it to some other and different purpose, if the buyer sustains damage from the non-delivery of the thing, he is to be shut out from recovering any damages in respect of the loss he may have sustained. I take the true proposition to be this. If the special purpose from which the larger profit may be obtained

[1] Part of the argument for the defendants is omitted.

is known to the seller, he may be made responsible to the full extent. But if the two parties are not *ad idem quoad* the use to which the article is to be applied, then you can only take as the measure of damages the profit which would result from the ordinary use of the article for the purpose for which the seller supposed it was bought. And the arbitrator, as I understand it, finds that the hull was capable of being applied profitably as a coal store, if it had not been applied by the plaintiffs to their special purpose.]

But no vessel of the sort had ever been applied to such a purpose as a coal store. And this kind of damage is a damage which the plaintiffs never suffered, and which they never contemplated suffering.

[Mellor, J. It was the most obvious purpose to which such a vessel could be applied in the plaintiffs' trade.

Cockburn, C.J. And the purpose to which it may be fairly supposed, and as in fact the defendants did suppose, that the plaintiffs would have applied it, had they been prevented by the failure of the machinery, or any other cause, from being able to apply it to their special purpose. And so far as the defendants, the sellers, expected that the plaintiffs, the buyers, would be losers by their non-delivery of the vessel according to contract, so far it is just and right that the defendants should be responsible in damages.]

That, no doubt, would be a just rule; but it is not the rule laid down in Hadley *v.* Baxendale.

[Blackburn, J. That argument seems to assume that the principle laid down in Hadley *v.* Baxendale is that the damages can only be what both parties contemplated, at the time of making the contract, would be the consequence of the breach of it; but that is not the principle laid down in Hadley *v.* Baxendale. The court say: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, i. e. according to the

usual course of things, from such breach of contract itself,"— that is one alternative, — "or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Now, in the present case the breach of contract was the non-delivery at the agreed time of a hull capable of being used as a hulk for storing coals, and the consequences that would naturally arise from such non-delivery of it would be that the purchaser would not be able to earn money by its use, and this loss of profit during the delay would be the measure of the damages caused by the non-delivery.]

COCKBURN, C.J. I think the construction which Mr. Coleridge seeks to put upon the case of Hadley *v.* Baxendale is not the correct construction as applicable to such a case as this. If that were the correct construction, it would be attended with most mischievous consequences, because this would follow, that whenever the seller was not made aware of the particular and special purpose to which the buyer intended to apply the thing bought, but thought it was for some other purpose, he would be relieved entirely from making any compensation to the buyer, in case the thing was not delivered in time, and so loss was sustained by the buyer; and it would be entirely in the power of the seller to break his contract with impunity. That would necessarily follow, if Mr. Coleridge's interpretation of Hadley *v.* Baxendale was the true interpretation. My brother Blackburn has pointed out that that is not the true construction of the language which the court used in delivering judgment in that case. As I said in the course of the argument, the true principle is this, that although the buyer may have sustained a loss from the non-delivery of an article which he intended to apply to a special purpose, and which, if applied to that special purpose, would have been productive of a larger amount of profit, the seller cannot be called upon to make good that loss if it was not within the scope of his contemplation that the thing would be applied to the purpose from which such larger profit might result; and

although, in point of fact, the buyer does sustain damage to that extent, it would not be reasonable or just that the seller should be called upon to pay it to that extent; but to the extent to which the seller contemplated that, in the event of his not fulfilling his contract by the delivery of the article, the profit which would be realized if the article had been delivered would be lost to the other party, to that extent he ought to pay. The buyer has lost the larger amount, and there can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and believed that the article would be applied to the ordinary purposes to which it was capable of being applied. I think, therefore, that ought to be the measure of damages, and I do not see that there is anything in Hadley *v.* Baxendale which at all conflicts with this.

Blackburn, J. I am entirely of the same opinion. I think it all comes round to this: The measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract, not more than that, but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, viz. that if the damage were exceptional and unnatural damage, to be made liable for that would be hard upon the seller, because if he had known what the consequence would be he would probably have stipulated for more time, or, at all events, have used greater exertions if he knew that that extreme mischief would follow from the non-fulfilment of his contract. On the other hand, if the party has knowledge of circumstances which would make the damages more extensive than they would be in an ordinary case, he would be liable to the special consequences, because he has knowledge of the circumstances which would make the natural consequences greater than in the other case. But Mr. Coleridge's argument would come to this, that the damages could never

be anything but what both parties contemplated; and where the buyer intended to apply the thing to a purpose which would make the damages greater, and did not intend to apply it to the purpose which the seller supposed he intended to apply it, the consequence would be to set the defendant free altogether. That would not be just, and I do not think that was at all meant to be expressed in Hadley *v.* Baxendale. Here the arbitrator has found that what the defendants supposed when they were agreeing to furnish the derrick was that it was to be employed in the most obvious manner to earn money, which the arbitrator assesses at £420 during the six months' delay; and as I believe the natural consequence of not delivering the derrick was that that sum was lost, I think the plaintiffs should recover to that extent.

Mellor, J. I am entirely of the same opinion. The question is, what is the limit of damages which are to be given against the defendants for the breach of this contract? They will be the damages naturally resulting, and which might reasonably be in contemplation of the parties as likely to flow, from the breach of such contract. It is not because the parties are not precisely *ad idem* as to the use of the article in question that the defendants are not to pay any damages. Both parties contemplated a profitable use of the derrick; and when one finds that the defendants contemplated a particular use of it as the obvious mode in which it might be used, I think as against the plaintiffs they cannot complain that the damages do not extend beyond that which they contemplated as the amount likely to result from their own breach of contract.

Judgment for the plaintiffs accordingly.

HORNE *v.* MIDLAND RAILWAY.

Common Pleas, 1872. L. R. 7 C. P. 583.

Willes, J. This case raises a very nice question upon the measure of damages to which a common carrier is liable for a breach of his contract to carry goods. It would seem that the

damages which he is to pay for a late delivery should be the amount of the loss which in the ordinary course of things would result from his neglect. The ordinary consequence of the non-delivery of the goods here on the 3rd of February would be that the consignee might reject them, and so they would be thrown upon the market generally, instead of going to the particular purchaser; and the measure of damages would ordinarily be in respect of the trouble to which the consignor would be put in disposing of them to another customer, and the difference between the value of the goods on the 3rd and the amount realized by a reasonable sale. That *primâ facie* would be the sum to be paid, in the absence of some notice to the carrier which would render him liable for something more special. These consequences would refer to the value of the goods at the time of their delivery to the carrier, the goods being consigned to an ordinary market, and being goods in daily use and not subject to much fluctuation in price. In the present case, taking 2*s*. 9*d*. per pair as the value of the shoes, the ordinary damages would be the trouble the plaintiffs were put to in procuring some one to take them at that price, plus the difference, if any, in the market value between the 3rd and the 4th of February. I find nothing in the case to show that there was any diminution in the value between those days. The plaintiffs' claim, therefore, in that respect would be covered by the £20 paid into court.

But they claim to be entitled to £267 3*s*. 9*d*. over and above that sum, on the ground that these shoes had been sold by them at 4*s*. a pair to a consignee who required them for a contract with a French house for supply to the French army, which price he would have been bound to pay if the shoes had been delivered on the 3rd of February. The special price which the consignee had agreed to pay was the consequence of the extraordinary demand arising from the wants of the French army; and the refusal of the consignee to accept the goods on the 4th was caused by the cessation of the demand for shoes of that character by reason of the war having come to an end. The market-price, therefore, we

must assume to have been 2*s.* 9*d.* a pair when the shoes were delivered to the carriers; and the circumstance which caused the difference was that the plaintiffs had had the advantage of a contract at 4*s.* a pair before the extraordinary demand had ceased. Was that, then, an exceptional contract? It was not, I take it, at the time the contract was entered into; but it was at the time the shoes were delivered to the carriers. The plaintiffs sustained a loss of 1*s.* 3*d.* a pair on the 4595 pairs of shoes which they failed to deliver in pursuance of their contract. It was, so to speak, a penalty thrown upon them by reason of the breach of contract. In that point of view, the contract was an exceptional one at the time the shoes were delivered to the carriers; and they ought to have been informed of the fact that by reason of special circumstances the sellers would, if the delivery had taken place in time, have been entitled to receive from the consignee a larger price for the shoes than they would have been entitled to in the ordinary course of trade. It must be remembered that we are dealing with the case of a common carrier, who is bound to accept the goods. It would be hard indeed if the law were to fix him with the further liability which is here sought to be imposed upon him, because he has received a notice which does not disclose the special and exceptional consequences which will or may result from a delayed delivery. I think the law in this respect has gone quite as far as good sense warrants. The cases as to the measure of damages for a tort do not apply to a case of contract. That was suggested in a case in Bulstrode (Everard *v.* Hopkins, 2 Bul. 332), but the notion was corrected in Hadley *v.* Baxendale. The damages are to be limited to those that are the natural and ordinary consequences which may be supposed to have been in the contemplation of the parties at the time of making the contract. I go further. I adhere to what I said in British Columbia Saw-Mill Co. *v.* Nettleship, Law Rep. 3 C. P. 499, at p. 509, viz. that "the knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with

reasonably believes that he accepts the contract with the special condition attached to it." Was there any notice here that the defendants would be held accountable for the particular damages now claimed? In the ordinary course of things, the value of the shoes was 2*s.* 9*d.* a pair at the time they were delivered to the defendants to be carried. There was no change in their market value between the 3rd of February and the 4th; and no notice to the carriers that the consignees had contracted to pay for them the exceptional price of 4*s.* a pair. The defendants had no notice of the penalty, so to speak, which a delay in the delivery would impose upon the plaintiffs. It would, as it seems to me, be an extraordinary result to arrive at, to hold that a mere notice to the carriers that the shoes would be thrown upon the hands of the consignors if they did not reach the consignees by the 3rd of February, should fix them with so large a claim, by reason of facts which were existing in the minds of the consignors, but were not communicated to the carriers at the time.

For these reasons I come to the conclusion that enough has been paid into court to cover all the damages which the plaintiffs are entitled to recover, and that there must be judgment for the defendants.[1]

SMITH *v.* GREEN.

Common Pleas Division, 1875. 1 C. P. D. 92.

Lord Coleridge, C.J. I am of opinion that there should be no rule in this case. The action is brought for the breach of a warranty upon the sale of a cow, that she was free from foot and mouth disease; and it appeared that the cow was, at the time of the sale, affected with that disease, and that the buyer, who was a farmer, having placed her along with other

[1] Keating, J., concurred. Affirmed in the Exchequer Chamber, L. R. 8 C. P. 131.

cows, the disease was communicated to them, and that she and some of them died. Besides a count upon the warranty, the declaration contained a count charging the defendant with a false and fraudulent representation that the cow in question was free from the complaint; but the jury negatived the alleged fraud. We are asked to grant a new trial on the ground that my brother Archibald misdirected the jury in telling them that, in estimating the damages to which the plaintiff was entitled for the breach of warranty, they might take into their consideration the fact that the buyer was a farmer, and that the seller knew, or must be taken to have known, that the diseased cow would be placed with other cows; and that, if they found that the defendant knew that fact, and that in the ordinary course of his business the plaintiff would so place her, then the loss of the other cows might fairly be considered to be the natural and necessary consequence of the defendant's breach of warranty, and they might assess the damages accordingly. I am of opinion that that direction was perfectly correct, and that the jury were quite right in taking that circumstance into account. The facts seem to me to bring the case clearly within the rule laid down by the Court of Exchequer in Hadley *v.* Baxendale. It is not necessary to consider whether the representation as to the state of the cow which was the subject of sale was fraudulent or not, because the rule is, that, where a party to a bargain makes an untrue statement as to the subject of sale, and damage results therefrom to the other party, the seller is answerable for such damage. Randall *v.* Raper, E. B. & E. 84; 27 L. J., Q. B., 266, proceeds upon that footing. There was no fraud there; but the defendant sold seed which turned out to be of a kind different from that which he warranted it to be, and the plaintiff having sown it, and a wrong crop having come up, he was held entitled to recover the difference in value of the crop as it was and as it ought to have been. In giving judgment, Lord Campbell says (E. B. & E. at p. 88): "It was a probable, a natural, and a necessary consequence of this seed not being chevalier barley that it did not produce the

expected quantity of grain. That is a consequence not depending upon the quality of the soil, but one necessarily resulting from the breach of contract as to the quality of the seed." And Erle, J., said (E. B. & E. at p. 89): "The warranty is, that the barley sold should be chevalier barley. The natural consequence of the breach of such a warranty is, that the barley which has been delivered having been sown, and not being chevalier barley, an inferior crop has been produced. This damage naturally results from the breach of the warranty, and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from chevalier barley: that is not inconsistent with Hadley *v.* Baxendale." There are many other cases (some of which have been cited) to the same effect. It seems to me that my brother Archibald correctly laid down the law in accordance with those authorities; and, it being fairly admitted that there was evidence on both sides, and the learned judge not being dissatisfied, I see no reason to doubt that the jury came to a right conclusion.[1]

HAMMOND *v.* BUSSEY.

Court of Appeal, 1887. 20 Q. B. Div. 79.

Lord Esher, M. R. In this case the plaintiffs bought from the defendant "steam-coal," which was to be coal suitable for use on steamers. At the time when the defendant sold the coal, he knew that the plaintiffs were buying the coal in order to sell it again to the owners of steamers calling at Dover to be used as steam-coal on such steamers; and he therefore knew that the plaintiffs would enter into contracts with others similar to the contract he himself had made with the plaintiffs, that is to say, into contracts for the sale of steam-coal, which would amount to a warranty that the coal was reasonably fit

[1] Brett and Grove, JJ., delivered concurring opinions.

to be used for the purposes of steam-coal on board steamers. He did not know, it is true, with what specific persons the plaintiffs would make such contracts, but that seems to me immaterial. The defendant supplied under the contract coal that was not reasonably fit to be used as such steam-coal, that is to say, something different from that which he had contracted to supply. The fact that this was so was not a fact which would be patent to the plaintiffs on inspection of the coal; it could only be found out when it came to be used, which was not by the plaintiffs, but by their sub-vendees. Such a breach of such a contract with regard to such a subject-matter necessarily made the plaintiffs liable to an action by their sub-vendees, and the result was the plaintiffs were sued for damages by their sub-vendees. The plaintiffs, when sued, would be in the difficulty that they had had no opportunity, at the time when they entered into the sub-contract, or when they delivered the coal, of knowing whether the coal answered the description given in such sub-contract. What then was the plaintiffs' position? Was it reasonable that they should take the mere word of the persons making a claim upon them that the coal was, not merely bad, but so bad that it could not reasonably be considered fit for use as steam-coal on steamships? Was it reasonable that they should, whether they were dealing with the matter on their own account or on account of the defendant, submit to such a claim without having in any way tested it?

If the defect in the coal had been one which would have been patent on inspection, and which the plaintiffs could have seen before they sold the coal again, the case might have assumed a different aspect. That not being so, the plaintiffs would have nothing to rely upon at first but the mere word of the sub-vendees. Under those circumstances it would not have been reasonable, either on their own account or on that of the defendant, for the plaintiffs to submit to judgment at once without defending the action or testing the claim in any way. If they were to defend the action, of course they would not be sure to win; whether they would

win or lose would depend on the extent to which the evidence went as to the quality of the coal, of which the plaintiffs could not judge, and which they probably could not satisfactorily ascertain or prove without the assistance of the defendant. In order to make themselves as safe as possible in this respect, the plaintiffs gave notice of the claim against them to the present defendant, and thereupon the defendant insisted that the coal he had supplied was according to contract. The value of that fact is to show the plaintiffs' position, and to make it still more reasonable that they should defend the action by their sub-vendees against them. They accordingly defended the action, and of course would become liable to costs in that action if, by reason of any breach of contract by the defendant, the defence was unsuccessful. That defence appears to have turned entirely on the question of breach of warranty. There is nothing to show that it depended on anything else, or that any damages were given except for the breach of warranty. The defendant has admitted that the damages given in that action were merely the damages naturally resulting from the breach of warranty, for he has paid the amount of them into court in this action. Furthermore, it is not suggested that the costs which the plaintiffs incurred were extravagantly or recklessly incurred, or that they are anything but fair and honest costs of a fair and honest defence. The plaintiffs sue the defendant for the damages occasioned by his admitted breach of contract, viz., in supplying coal not according to contract. The question is, what are the damages which they can recover? We find the rule of law as to measure of damages enunciated in the case of Hadley *v.* Baxendale. It may be that the rule so laid down was not necessary for the purpose of deciding that case, but it is far too late to question it. The rule, though frequently commented upon, has been over and over again adopted by the courts, and must now be considered to be the law on the subject. We must therefore treat the present case on the footing that the question is as to the true application of that rule to the measure of damages for such a breach of such a

contract under such circumstances as we have to deal with here. We have not got to determine how that rule would apply to other breaches of other contracts under other circumstances than those we have now to consider. The rule is laid down thus: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract" — it is to be observed in passing that the rule is not contemplating a breach of a contract to pay damages, but the damages which are recoverable in respect of a breach — "should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself." That is the enunciation of the rule with regard to damages for a breach of contract where no special circumstances arise, and would apply to this case if there had been no sub-contract which the defendant knew to exist or to be likely to be made. The rule goes on to state what the measure of damages is where there are special circumstances, as follows: "or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." It has been argued that these words are not an enlargement of the former part of the rule, but I cannot take that view of them. It is to be observed that the words are not "such damages as were in fact in the contemplation of the parties at the time they made the contract," which would have raised a question of fact for the jury, but "such as may reasonably be supposed to have been in the contemplation of the parties," not as the inevitable, but as "the probable result of the breach." The next sentence of the judgment is, I think, to be considered rather as a valuable exemplification of the rule, an illustration of the circumstances under which the second branch of the rule would apply, than as part of the rule itself. It proceeds: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages

resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." I do not think that there is anything in those words to show that the second branch of the rule must be confined to the case of a sub-contract already actually made at the time of the making of the contract, and would not apply to the case of a sub-contract not yet actually made, but which will probably be made. I think that this sentence must be looked upon as intended to be an exemplification of the second branch of the rule already stated rather than as part of it; and in any case it seems to me clear that the rule would apply to the case of a sub-contract which within the knowledge of the defendant was in the ordinary course of business sure to be made. We have to apply that rule to the sale and purchase of such an article with such a warranty as that now in question, with the knowledge on the part of the vendor that there would be a subsale by the vendees with a similar warranty; and to see whether, under these circumstances, the bringing of an action by the sub-vendees in the event of there being a breach of the warranty by the vendees, and the defence of such action by the vendees, are consequences that may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as a probable result of the breach of it. Such a question is one upon which those who have to determine it must exercise their minds according to the circumstances of the particular case. It is impossible for us to lay down a rule as to what would be reasonably to be supposed to have been in the contemplation of the parties in the cases of other contracts made with regard to other subject-matters under other circumstances. We can only apply the rule laid down as above stated to the circumstances of the case before us. We must say, using our knowledge of business and affairs, what may reasonably be supposed to have been in the contemplation of the parties as the result of a breach of the contract under the circumstances. I do not

think that the question is one for a jury, though I think that possibly, under certain circumstances, with regard to some subject-matters, it would be competent to a judge to ask particular questions of a jury in order to assist him in coming to a conclusion on such a question. There are, however, no such circumstances here. I cannot doubt that any business man would contemplate, as being, according to the ordinary course of things under the circumstances, not only the probable but the inevitable result of such a breach of contract, that there would be a lawsuit by the sub-vendees, and that the reasonable course to be pursued by the vendees might be that they should not at once submit to the claim, but that, unless they could get information from the vendor that there was really no defence, they should defend the action. It would not, of course, be the inevitable result that the vendees should lose the action; that would depend on the question whether there was a breach of the warranty, and whether, if so, it could be proved. If, however, it were proved, then of course the result would be that the vendees must incur costs; and it seems to me that such costs would under the circumstances come within the second branch of the rule in Hadley v. Baxendale.

It has been argued that, upon the true construction of the rule in that case, such costs cannot be recoverable as the result of a breach of contract, unless there has been a contract of "indemnity." The meaning of that term has been much discussed during the argument. I may in previous cases, in which the question was as to the damages incurred by reason of the breach of a contract, where there was a sub-contract, have used expressions to the effect that, where the special circumstances were known to the original vendor, the law would imply a contract to indemnify. I do not feel sure, having regard to the language used by Willes, J., in Collen v. Wright, 8 E. & B. 657, that the obligation implied by the law under such circumstances as those with which we are now dealing might not be correctly expressed by that formula; but I purposely abstain from so deciding. I do not think it

necessary to put the case on that footing, inasmuch as the way in which I have put it, by applying the rule in Hadley *v.* Baxendale, viz., that the question is whether the damages claimed may reasonably be supposed to have been within the contemplation of the parties at the time when they made the contract, seems to be another and perhaps a better way of expressing it. For the purpose of substantiating the argument that there must be a contract to indemnify, express or implied, in order to enable costs such as these to be recovered as damages, expressions used in previous cases have been referred to. The language used by me in the case of Grébert-Borgnis *v.* Nugent, 15 Q. B. D. 85, has been relied upon for the defendant. But that language must be read in connection with the subject-matter. I was there giving an account of the circumstances of that case, as I have given an account of the circumstances of this case, and I used that language in expressing what I conceived to be the particular circumstances of that case, which made the rule in Hadley *v.* Baxendale applicable. It seems to me immaterial whether the phraseology I used in so doing was exactly accurate, for, if the circumstances of that case did come within that rule, it comes to the same thing. There was nothing said by me in that case which really adds anything to or takes anything from the rule enunciated in Hadley *v.* Baxendale as applicable to a case like the present. The case of Birmingham, &c., Land Co. *v.* London and North-Western Railway Co., 34 Ch. D. 261, was referred to for the same purpose. It is only necessary to say with regard to that case that the court was not there construing the rule as to damages laid down in Hadley *v.* Baxendale, but the provisions of Order XVI., rule 48, with regard to the question whether the third party procedure was applicable. It does not seem to me that such a case has any bearing upon the present question. There are cases which would, no doubt, be authorities on the question before us but for the fact that they were decided prior to Hadley *v.* Baxendale. Lewis *v.* Peake, 7 Taunt. 153, is such a case, but I do not think such decisions are now of any use. It seems to me

that the case of Collen *v.* Wright, 8 E. & B. 647, is really a strong authority with regard to the question now before us, though of course the court were not there dealing especially with the rule as to measure of damages. Then I come to the case of Baxendale *v.* London, Chatham, and Dover Ry. Co., Law Rep. 10 Ex. 35. If I thought that that case had decided that, however reasonably it might be supposed that the parties contemplated that there would be an action on the sub-contract as a result of the breach of contract, and that the plaintiffs, acting as reasonable men, would defend that action, and however reasonable the incurring of the costs might be, yet those costs could not be recovered as damages, I should feel bound by that decision, for it is a decision of a court of co-ordinate jurisdiction. And I must admit that I have felt considerable anxiety as to whether the decision does touch the point now before us. It is useless to discuss at length all the verbal criticism which has been directed during the argument to the language of the judgments in that case. I must confess to feeling some difficulty as to the exact effect of much that was said in those judgments, but I think it is quite clear that what the court did in effect decide was that the costs in question were not reasonably incurred in that case, and therefore they could not be recovered. The case therefore decides that, where the costs are unreasonably incurred, they cannot be recovered, but it is not, as it seems to me, a decision that, where the costs were under all the circumstances reasonably incurred, they cannot be recovered. I then come to the case of Fisher *v.* Val de Travers Asphalt Co., 1 C. P. D. 511. I must admit, after the discussion that has now taken place, that I doubt whether, when that case came before the court, I did quite correctly appreciate what was decided and what was not in the case of Baxendale *v.* London, Chatham, and Dover Ry. Co., *supra*. Assuming that I did not in that case take an altogether correct view of the decision in Baxendale *v.* London, Chatham, and Dover Railway Co., and therefore gave a wrong reason for the decision there, that could have no effect upon the true meaning of the previous decision; and

it by no means follows that, because a reason given for the decision in Fisher *v.* Val de Travers Asphalt Co. was wrong, that therefore the decision itself was wrong. It is unnecessary, however, now to discuss that question. It does not seem to me that there is really any case which alters the rule as laid down in Hadley *v.* Baxendale, or which prevents our applying that rule in the terms in which it stands in the judgment there given as I have applied it to the present case. To my mind it is perfectly clear that, according to a reasonable business view of the reasonably probable course of business, the parties may be supposed to have contemplated, at the time when the contract was made, as the inevitable or at any rate the highly probable result of a breach of it, that there would be a lawsuit between the plaintiffs and their subvendees, in which it would be reasonable for the plaintiffs to defend, and in which, if it turned out that there was a breach of the warranty, the plaintiffs would lose, and that they would thereby necessarily incur costs. Costs incurred under such circumstances appear to me to fall within the second branch of the rule in Hadley *v.* Baxendale. I therefore think that the plaintiffs were entitled to recover over from the defendant in respect of their costs, and that the decision of the learned judge below was right, and should be affirmed.

WELCH *v.* ANDERSON.

Court of Appeal, 1891. 61 L. J. (N. S.) Q. B. 167.

The defendants, shipping brokers, agreed with the plaintiffs to load for them on board the Hinemoa, a vessel of which the defendants were the charterers, then lying at a berth in the London docks, 100 tons of tiles, which were to arrive alongside the vessel in the Great Western Railway Company's trucks from Bridgwater. The tiles were to be at the docks ready to be loaded on or before the 16th of December, 1890. The plaintiffs thereupon caused the tiles to be brought from

Bridgwater to Poplar, the nearest station to the docks on the Great Western Railway Company's line, and entered into a special agreement with the dock company for haulage of the trucks into the docks, and placing the goods alongside the Hinemoa ready to be loaded, at a rate of 3*s.* per ton. The trucks were accordingly hauled into the docks, and the goods were ready to be delivered by the time specified by the defendants, namely, the 16th of December. The defendants, however, were only able to load a small number of truck-loads of the goods on board the Hinemoa, and the remainder of the goods had to be loaded upon another vessel of the defendants. In consequence of the delay in loading the goods the railway trucks were detained for a considerable time at the docks, and the plaintiffs were obliged to pay the railway company £42 for demurrage. It appeared from the table of rates of the London docks that the rate for "wharfage and porterage" of "tiles" coming by rail was 3*s.* 9*d.* per ton, and from the memorandum prefixed to the table, that this included also warehouse rent for three weeks, but there did not appear to be any instance of a shipment of tiles in accordance with this rate. The whole of the goods were loaded on the second vessel within three weeks from the 16th of December.

The plaintiffs claimed, amongst other items of damage, to recover from the defendants the £42 (which was admitted to be a reasonable amount) paid to the railway company.

At the trial Lord Coleridge, C.J., left it to the jury to say whether the demurrage was the reasonable and normal consequence of the defendants' breach of contract. The jury found a verdict for the plaintiffs, and judgment was given accordingly. The defendants appealed.

Lord Esher, M.R. I am of opinion that this appeal must be dismissed, and that the judgment entered for the plaintiffs must stand. The argument put forward on behalf of the defendants is, as it seems to me, an attempt to invent a doctrine which is not the doctrine laid down in Hadley *v.* Baxendale; or, rather, is an attempt to invert the application of the rule there laid down. In the present case the contract

entered into by the defendants was to have their ship ready to load by the 16th of December, on which day the plaintiffs were to have their goods alongside ready to put on board. That contract the defendants broke; the ship was at the berth, but was not ready to load, whereas it was the duty of the defendants to have their ship in such a condition that, if the tiles were brought alongside, the loading might proceed. That being so, the only question to be determined is, what is the proper rule as to the measure of damages? It seems to me that here the demurrage of the trucks by which the tiles were brought alongside the ship was the natural, reasonable, and ordinary consequence of the defendants' breach of contract. A shipowner must know that such goods as tiles cannot reasonably and in ordinary business be brought alongside his ship to be loaded except in vehicles, by which I mean, in barges, or in railway trucks, or carts. Physically, of course, they might be brought on men's shoulders, but that is not the ordinary business way. Now if, instead of being brought alongside by land, the tiles had in the present case been brought in barges, and the ship had not been ready to take them on board, the shipowner must have known that demurrage would have to be paid on the barges. If the goods had been brought in carts, it seems to me that it would equally be the ordinary and natural result of the ship not being ready to load them that the goods would have to be kept in the carts. Why should they be taken out of the carts and placed on the quay? The natural result would be that the carts would be detained. It would, of course, be exactly the same if the goods came by railway. It seems to me, therefore, in this case that the ordinary and natural result of a breach of the contract entered into by the defendants would be that the trucks in which the goods to be loaded were brought alongside would be detained, and that the shippers would have to pay. If that would be the natural and ordinary result of the defendants' breach of contract, we have nothing to do with the second part of the rule in Hadley *v.* Baxendale, which applies only where the damages are not the natural and ordinary result, in which case they are, according

to Hadley *v.* Baxendale, not recoverable unless the party seeking to recover them can show that they may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of the breach of it — that part of the rule is, as I have said, not brought into play if the damages sought to be recovered are damages which are the natural and ordinary result of the breach of contract, and therefore does not apply to the present case, where those are the only damages which the plaintiffs are claiming. The natural result of the defendants' breach of their contract was that the plaintiffs had to pay demurrage, and that is the damages they now ask for.

But the defendants contend that in the present case there is a peculiar state of things which alters the ordinary rule. "If," say they, "you, the plaintiffs, had paid the usual rate charged by the dock company, you could have put the goods in sheds and kept them there for three weeks free of charge, and if that had been done you would have had no demurrage to pay, and would have suffered no damage; if you had followed the ordinary course of business, you would have paid that rate, and though we do not say that you were bound to follow that course, still, if you intended to go out of that ordinary course of business, you ought to have given us notice of the fact." That contention appears to me to be an attempt to apply, not as against a plaintiff who is claiming damages greater than those which would be the natural result of a breach of contract, but as against a plaintiff who is claiming only such damages as are the natural result of the defendants' breach of contract, a kind of rule like the second part of the rule in Hadley *v.* Baxendale. I meet the contention at once by saying that the defendants had no right to suppose that the plaintiffs would carry on their business in any particular way. The plaintiffs had a right to have their goods carried alongside the ship and kept there in any reasonable way they might think fit, and the defendants had no right to expect that they would do so in any particular way; and, therefore, have no right to say that if the plaintiffs did not arrange to

have their goods brought alongside in the accustomed way, they were bound to inform the defendants. In my opinion, the Lord Chief Justice might have ruled that this was an undefended action, and that the only question for the jury was as to the amount of the damages. The defendants certainly cannot complain because, instead of doing that, he left the whole matter to the jury. For the reasons I have given, I think that the judgment must stand, and that the appeal must be dismissed.

McHOSE *v.* FULMER.

Pennsylvania, 1873. 73 Pa. 365.

Sharswood, J.[1] When a vendor fails to comply with his contract, the general rule for the measure of damages undoubtedly is, the difference between the contract and the market price of the article at the time of the breach. This is for the evident reason that the vendee can go into the market and obtain the article contracted for at that price. But when the circumstances of the case are such that the vendee cannot thus supply himself, the rule does not apply, for the reason of it ceases: Bank of Montgomery *v.* Reese, 2 Casey, 143. "It is manifest," says Mr. Chief Justice Lewis, "that this (the ordinary measure) would not remunerate him when the article could not be obtained elsewhere." If an article of the same quality cannot be procured in the market, its market price cannot be ascertained, and we are without the necessary *data* for the application of the general rule. This is a con-

[1] In this case the defendant was sued on a note given in payment for iron: he set up a defence (by way of recoupment) that part of the iron called for by his contract with plaintiff had not been delivered, and that "by the neglect and refusal of plaintiffs to furnish said iron, defendants were obliged to get an inferior quality of iron than that which plaintiffs were to furnish, in order to carry on the business of said mill, and being inferior they lost the contract with the parties with whom they had contracted for the sale and delivery of iron."

tingency which must be considered to have been within the contemplation of the parties, for they must be presumed to know whether such articles are of limited production or not. In such a case the true measure is the actual loss which the vendee sustains in his own manufacture, by having to use an inferior article or not receiving the advance on his contract price upon any contracts which he had himself made in reliance upon the fulfilment of the contract by the vendor. We do not mean to say, that if he undertakes to fill his own contracts with an inferior article, and in consequence such article is returned on his hands, he can recover of his vendor, besides the loss sustained on his contracts, all the extraordinary loss incurred by his attempting what was clearly an unwarrantable experiment. His legitimate loss is the difference between the contract price he was to pay to his vendor and the price he was to receive. This is a loss which springs directly from the non-fulfilment of the contract. The affidavits of defence are not as full and precise upon this point as they might and ought to have been, but they state that the defendants below had entered into such contracts, and that they were unable to get the same quality of iron which the plaintiff had agreed to deliver, and this, we think, was enough to have carried the case to a jury. *Judgment reversed, and a procedendo awarded.*

CASE *v.* STEVENS.

Massachusetts, 1884. 137 Mass. 551.

W. Allen, J. This is an action of tort for a breach of a warranty that a horse sold by the defendants to the plaintiff was kind. It is alleged that the defendants knew that the warranty was false. The only damage alleged is for the breaking of the plaintiff's wagon and harness in consequence of the unkindness of the horse; and the plaintiff claimed no other damages in the court below. The court ruled that such damages could not be recovered upon the facts alleged; and the only question is upon the correctness of that ruling.

The ruling was correct. The warranty related only to the value of the horse, and there is nothing in the declaration to show that it was given or received in view of anything else. The only damage in consequence of the breach of it, which is brought within the contemplation of the parties, is the diminution in value of the property warranted. The declaration contains no allegations which bring it within the principle of Allen *v.* Truesdell, 135 Mass. 75, and other cases of false representations or warranties of fitness for particular uses contemplated by the parties.

Exceptions overruled.

MATHER *v.* AMERICAN EXPRESS CO.

Massachusetts, 1884. 138 Mass. 55.

Contract for the loss of a package containing a part of a set of plans for a house, delivered by the plaintiff to the defendant for transportation from Northampton to Boston.[1]

Field, J. It is not denied that the defendant is liable in damages for the reasonable cost of the new plans, and for other expenses, if there were any reasonably incurred in procuring the new plans; but it is denied that the defendant is liable in damages for the delay in constructing the house occasioned by the loss of the plans. It is assumed that the plans had no market value, and were only useful to the plaintiff. The rule of damages, then, is their value to the plaintiff. As new plans could not be bought in the market ready made, some time necessarily must be consumed in making them, and the plaintiff contends that the value of the plans for immediate use, or for use at the time he would have received them from Boston, if the defendant had duly performed its contract, is their value to him, and that this value is made up of the cost of procuring the new plans and the damages occasioned by the delay. Whatever he calls

[1] The statement of facts is omitted.

it, it is damages for the delay in constructing the house caused by the loss of the original plans that he seeks to recover. It does not appear that the defendant had notice of the contents of the package at the time it was delivered for transportation, or any notice or knowledge that the plaintiff needed the plans for the construction of a house which he had begun to build. The damages caused by the delay are not such as usually and naturally arise solely from a breach of the contract of the defendant to carry the package safely to its destination, nor were they within the reasonable contemplation of both parties to this contract, as likely to arise from such a breach. The fact that the plans had a special value to the plaintiff, and could not be purchased, does not touch the question of including in the damages the injury to the plaintiff occasioned by reason of other contracts which he had made, and of work which he had undertaken in expectation of having the plans for use immediately, or after the usual delay involved in sending the plans to Boston, and in having them traced and returned to him. Damages for such injury are not given unless the circumstances are such as to show that the defendant ought fairly to be held to have assumed a liability therefor when it made the contract.

We think that Hadley *v.* Baxendale, 9 Exch. 341, which has been cited with approval by this court, governs this case.

The case of Green *v.* Boston & Lowell Railroad, 128 Mass. 221, on which the plaintiff relies, was an action to recover the value of an "oil painting, the portrait of the plaintiff's father." The opinion attempts to lay down a rule for determining the value of such a painting, when the plaintiff had no other portrait of his father, and when, so far as appears, it had no market value; but the opinion does not discuss any question of damages not involved in determining the value of the portrait to the plaintiff. The plaintiff in that case made no claim for damages occasioned by a loss of a profitable use of the portrait. *Exceptions sustained.*

LYNN GAS AND ELECTRIC CO. *v.* MERIDEN FIRE INSURANCE CO.

Massachusetts, 1893. 158 Mass. 570.

Contract against several insurance companies upon concurrent policies of the Massachusetts standard form, insuring the building and machinery of the plaintiff against loss or damage by fire.[1]

Knowlton, J. The only exception relied on by the defendants in these cases is that relating to the claim for damage to the machinery used in generating electricity and to the building from a disruption of the machinery. This machinery was in a part of the building remote from the fire, and none of it was burned. In his charge to the jury the judge stated the theory of the plaintiff as follows: "The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the tower a connection was made between them called a short circuit; that the short circuit resulted in keeping back or in bringing into the dynamo below an increase of electric current that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed, and the succeeding pulleys up to the jack-pulley were ruptured; that by reason of pieces flying from the jack-pulley, or from some other cause, the fly-wheel of the engine was destroyed, the governor broken, and everything crushed; — in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt through the action of electricity, and that caused the damage." The plaintiff contended that

[1] The statement of facts is omitted.

the short circuit was produced by the fire, either by means of heat on the horns of the lightning arresters, or by a flame acting as a conductor between the two horns, or in some other way. The jury found that the plaintiff's theory of the cause of the damage was correct, and the question is whether the judge was right in ruling that an injury to the machinery caused in this way was a "loss or damage by fire," within the meaning of the policy.

The subject matter of the insurance was the building, machinery, dynamos, and other electrical fixtures, besides tools, furniture, and supplies used in the business of furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery, and that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with machinery used in generating and transmitting strong currents of electricity.

The subject involves a consideration of the causes to which an effect should be ascribed when several conditions, agencies, or authors contribute to produce an effect. The defendants contend that the application of the principle which is expressed by the maxim, *In jure non remota causa sed proxima spectatur*, relieves them from liability in these cases. It has often been necessary to determine, in trials in court, what is to be deemed the responsible cause which furnishes a foundation for a claim when several agencies and conditions have a share in causing damage, and the best rule that can be formulated is often difficult of application. When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen. Freeman *v.* Mercantile Accident Association, 156 Mass. 351. The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source

is the direct and proximate cause referred to in the cases. McDonald *v.* Snelling, 14 Allen, 290. Perley *v* Eastern Railroad, 98 Mass. 414, 419. Gibney *v.* State, 137 N. Y. 529. In Milwaukee & St. Paul Railway *v.* Kellogg, 94 U. S. 469, 474, Mr. Justice Strong, who also wrote the opinions in Insurance Co. *v.* Transportation Co., 12 Wall. 194, and in Western Massachusetts Ins. Co. *v.* Transportation Co., 12 Wall. 201, which are much relied on by the defendants, used the following language in the opinion of the court: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

If this were an action against one who negligently set the fire in the tower, and thus caused the injury to the machinery, it is clear, on the theory of the plaintiff that the negligent act of setting the fire would be deemed the active efficient cause of the disruption of the machinery and the consequent injury to the building. It remains to inquire whether there is a different rule in an action on a policy of fire insurance.

Under our statute creating a liability for damages received from defects in highways, it is held that the general rule is so far modified that there can be no recovery unless the defect is the sole cause of the accident; but this doctrine rests on the construction of the statute. Tisdale *v.* Norton, 8 Met. 388. Marble *v.* Worcester, 4 Gray, 395. Jenks *v.* Wilbraham, 11 Gray, 142. McDonald *v.* Snelling, 14 Allen, 290. Babson *v.* Rockport, 101 Mass. 93.

In suits brought on policies of fire insurance, it is held that the intention of the defendants must have been to insure

against losses where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it, or set it in motion, if the original efficient cause was not itself made a subject of separate insurance in the contract between the parties. For instance, where the negligent act of the insured, or of anybody else, causes a fire, and so causes damage, although the negligent act is the direct, proximate cause of the damage, through the fire, which was the passive agency, the insurer is held liable for a loss caused by the fire. Johnson *v.* Berkshire Ins. Co., 4 Allen, 388. Walker *v.* Maitland, 5 B. & Ald. 171. Waters *v.* Merchants' Louisville Ins. Co., 11 Pet. 213. Peters *v.* Warren Ins. Co., 14 Pet. 99. General Ins. Co. *v.* Sherwood, 14 How. 351. Insurance Co. *v.* Tweed, 7 Wall. 44. This is the only particular in which the rule in regard to remote and proximate causes is applied differently in actions on fire insurance policies from the application of it in other actions. A failure sometimes to recognize this rule as standing on independent grounds, and established to carry out the intention of the parties to contracts of insurance, has led to confusion of statement in some of the cases. The difficulty in applying the general rule in complicated cases has made the interpretation of some of the decisions doubtful; but on principle, and by the weight of authority in many well-considered cases, we think it clear that, apart from the single exception above stated, the question, What is a cause which creates a liability? is to be determined in the same way in actions on policies of fire insurance as in other actions. Scripture *v.* Lowell Ins. Co., 10 Cush. 356. New York & Boston Despatch Express Co. *v.* Traders & Mechanics' Ins. Co., 132 Mass. 377. St. John *v.* American Ins. Co., 1 Kernan, 516. General Ins. Co. *v.* Sherwood, 14 How. 351. Insurance Co. *v.* Tweed, 7 Wall. 44. Waters *v.* Merchants' Louisville Ins. Co., 11 Pet. 213, 225. Livie *v.* Janson, 12 East, 648. Ionides *v.* Universal Ins. Co., 14 C. B. (N. S.) 259. Transatlantic Ins. Co. *v.* Dorsey, 56 Md. 70. United Ins. Co. *v.* Foote, 22 Ohio St. 340.

In the present case, the electricity was one of the forces of nature, — a passive agent working under natural laws, — whose existence was known when the insurance policies were issued. Upon the theory adopted by the jury, the fire worked through agencies in the building, the atmosphere, the metallic machinery, electricity, and other things; and working precisely as the defendants would have expected it to work if they had thoroughly understood the situation and the laws applicable to the existing conditions, it put a great strain on the machinery and did great damage. No new cause acting from an independent source intervened. The fire was the direct and proximate cause of the damage according to the meaning of the words "direct and proximate cause," as interpreted by the best authorities. The instructions to the jury were full, clear, and correct, and the defendants' requests for instructions were rightly refused.

Exceptions overruled.

DENNY *v.* NEW YORK CENTRAL RAILROAD.

Massachusetts, 1859. 13 Gray, 481.

Merrick, J. This action is brought to recover compensation for damages alleged to have been sustained by the plaintiff in consequence of an injury to a quantity of his wool delivered to the defendants to be transported for him from Suspension Bridge to Albany. It appears from the report that the wool, directed to Boston, was received by them at the former, and carried to the latter place, and was there safely deposited in their freight depot. But it was not transported seasonably nor with reasonable despatch. By their failure to exercise the degree of care and diligence required of them by law, it was detained six days at Syracuse, and consequently arrived at Albany so many days later than it should regularly have been there. Whilst it was lying in the defendant's freight depot in that city, it

was submerged by a sudden and violent flood in the Hudson River. This rise of the water caused the alleged injury to the wool.

Upon the evidence adduced by the parties at the trial, three questions of fact were submitted to the determination of the jury. It is necessary now to advert only to the first of those questions; for the finding of the jury in relation to the second was in favor of the defendants, and the verdict in relation to the third has on their motion been already set aside as having been rendered against the weight of evidence in the case.

In looking at the terms and language in which the action of the jury in reference to the first of these questions is expressed, it would perhaps, at first sight, seem that they had passed upon and determined the precise point in issue between the parties, namely, whether the wool was injured by reason of an omission on the part of the defendants to exercise the care and diligence in the transportation of the wool, which the law required of them as common carriers. If this were so, it would have been a final and conclusive determination. But upon a closer scrutiny of the statements in the report, it appears that the jury, by their answer to the question submitted to them, intended only to affirm, that the defendants failed to exercise due care and diligence in the prompt and seasonable transportation of the wool, and that by reason of this failure and the consequent detention of the wool at Syracuse, it was injured by the rise of water in the Hudson, and thereby sustained damage to which it would not have been exposed if it had arrived at Albany as soon as it should have done, because in that event it would have been taken away from the defendants' freight depot, and carried forward to Boston before the occurrence of the flood. And it was upon this ground that the verdict was rendered for the plaintiff. This was so considered by both parties in their arguments upon the questions of law arising upon the report.

It is therefore now to be determined by the court, whether the defendants are, by reason and in consequence of their

negligence in the prompt and seasonable transportation of the wool, responsible for the injury which it sustained after it was safely deposited in their depot at Albany. And we think it is very plain that, upon the well-settled principles of law applicable to the subject, they are not.

It is said to be an ancient and universal rule resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate and not for the remote consequences of his actions. 2 Parsons on Con. 456. The rule is not limited to cases in which special damages arise; but is applicable to every case in which damage results from a contract violated or an injurious act committed. 2 Greenl. Ev. § 256. 2 Parsons on Con. 457. And the liabilities of common carriers, like persons in other occupations and pursuits, are regulated and governed by it. Story on Bailments, 586. Angell on Carriers, 201. Morrison *v.* Davis, 20 Penn. State R. 171.

In the last-named case, it is said that there is nothing in the policy of the law relating to common carriers, that calls for any different rule, as to consequential damages, to be applied to them. In that case may be found not only a clear and satisfactory statement of the law upon the subject, but a significant illustration of the rule which the decision recognizes and affirms. It was an action against the defendants, as common carriers upon the Pennsylvania Canal. It appeared that their canal boat, in which the plaintiff's goods were carried, was wrecked below Piper's Dam, by reason of an extraordinary flood; that the boat started on its voyage with a lame horse, and by reason thereof great delay was occasioned in the transportation of the goods; and that, had it not been for this, the boat would have passed the point where the accident occurred, before the flood came, and would have arrived in time and safety at its destination. The plaintiff insisted that, inasmuch as the negligence of the defendants in using a lame horse for the voyage occasioned the loss, they were therefore liable for it. But the court, assuming that the flood was the proximate cause of

the disaster, held, that the lameness of the horse, by reason of which the boat, in consequence of his inability thereby to carry it forward with the usual and ordinary speed, was exposed to the influence and dangers of the flood, was too remote to make the defendants responsible for the goods which were lost in the wreck. It was only, in connection with other incidents, a cause of the final, direct, and proximate cause by which the damages sought to be recovered were immediately occasioned.

There is so great a resemblance between the circumstances upon which the determination in that case was made, and those upon which the question under consideration in this arises, that the decision in both ought to be the same. In this case the defendants failed to exercise due care and diligence, in not being possessed of a sufficient number of efficient working engines to transport the plaintiff's wool with the usual ordinary and reasonable speed. The consequence of this failure on their part was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence, and for this they are clearly responsible. But in all that occurred afterwards there was no failure in the performance of their duty. There was no delay and no negligence in any part of the transportation between Syracuse and Albany, and upon reaching the latter place the wool was safely and properly stored in their freight depot. It was their duty to make this disposition of it. They had then reached the terminus of their road; the carriage of the goods was then complete; and the duty only remained of making delivery. The deposit of the wool in the depot was the only delivery which they were required to make; and having made that, their liabilities as carriers thenceforward ceased. It was there to be received by the owner, or taken up by the proprietors of the railroad next in course of the route to Boston. Norway Plains Co. *v.* Boston & Maine Railroad, 1 Gray, 263. Nutting *v.* Connecticut River Railroad, 1 Gray, 502. The rise of waters in the Hudson, which did the mischief to the wool, occurred at a

period subsequent to this, and consequently was the direct and proximate cause to which that mischief is to be attributed. The negligence of the defendants was remote; it had ceased to operate as an active, efficient, and prevailing cause as soon as the wool had been carried on beyond Syracuse, and cannot therefore subject them to responsibility for an injury to the plaintiff's property, resulting from a subsequent inevitable accident which was the proximate cause by which it was produced. It is to the latter only to which the loss sustained by him is attributable.

It follows from these considerations, that the verdict in the plaintiff's behalf must be set aside, and a new trial be had; in which he will recover such damages as he proves were the direct consequence of the negligence of which the defendants may be shown to have been guilty.

New trial ordered.

FOX *v.* BOSTON & MAINE RAILROAD.

Massachusetts, 1889. 148 Mass. 220.

Contract to recover damages for the loss of a car-load of apples, with a count in tort alleged to be for the same cause of action. At the trial in the Superior Court, before Blodgett, J., a verdict was returned for the defendant, and the plaintiff alleged exceptions to a ruling of the presiding judge, which ruling, together with the material facts, appears in the opinion.

Morton, C.J. The plaintiff offered to prove that on February 22, 1881, he made a special contract with the defendant, by the terms of which it was to transport a car-load of apples from Haverhill to Portland, and deliver it to the Maine Central Railroad, a connecting railroad, in time to be transported by the latter corporation to Bangor by a freight train which left Portland early in the morning of February 23; that the weather was mild on the 22d and 23d days of February, and that "the agreement with the defendant was made with reference to the mildness of the

weather, and the importance of having the apples delivered to the Maine Central Railroad at the agreed time;" that the defendant negligently delayed to deliver the apples at the time agreed, and by reason of this negligence they "were caught in cold weather in course of transportation from Portland to Bangor, arriving at the latter place in a frozen condition." The presiding judge ruled that, "if the market value of the apples when they reached Portland was only diminished in the respect that a liability of being frozen during the course of the transportation by the Maine Central Railroad was incurred or increased by reason of the negligent delay of the defendant in the transportation from Haverhill to Portland, the plaintiff cannot recover in this action for that diminution in market value." If we understand this ruling, its effect was to restrict the plaintiff's right to recover to the diminution in the market value of the apples at Portland caused by the delay, and to prevent his recovering anything for the damage to the apples by freezing in the transportation from Portland to Bangor.

The general rule is, that where goods are delivered in the usual way to a carrier for transportation, and there is a negligent delay in delivering them, the measure of damage is the diminution in the market value of the goods between the time when they ought to have been delivered and the time when they were in fact delivered. Ingledew *v.* Northern Railroad, 7 Gray, 86. Cutting *v.* Grand Trunk Railway, 13 Allen, 381. Scott *v.* Boston & New Orleans Steamship Co., 106 Mass. 468. Harvey *v.* Connecticut & Passumpsic Rivers Railroad, 124 Mass. 421. These cases are put upon the ground that the duty of the carrier is the measure of his liability; that his duty is to carry the goods to the end of his line, and that any future risks to which the goods may be exposed are not within the contemplation of the parties or the scope of their contract. But we think a different rule prevails where the parties make a special contract, which provides for certain risks to which the goods are exposed on the connecting line.

Thus, in the case before us, the parties made a special

contract, by which the defendant agreed to deliver the apples to the Maine Central Railroad by a fixed time, so that they would arrive in Bangor in the afternoon of February 23. Both parties knew that the apples were not to be sold in Portland, but were to be forwarded to Bangor, and the special contract was made for the purpose of avoiding the danger of the apples freezing on the connecting line. This risk was anticipated, and contemplated by the parties, and if the danger which it was intended to provide against was incurred by reason of the negligent failure of the defendant to perform its contract, it ought to be responsible in damages. The damages are not too remote. If the freezing had occurred on the defendant's line, it cannot be doubted that the law would regard the delay as the proximate cause of the damage; it is none the less so, because it happened on a connecting line. The damage was not caused by any extraordinary event subsequently occurring, but was caused by an event which was, according to the common experience, naturally and reasonably to be expected, a change of temperature.

The case is thus distinguished from the cases of Denny *v.* New York Central Railroad, 13 Gray, 481, and Hoadley *v.* Northern Transportation Co., 115 Mass. 304. In each of these cases, the loss to the plaintiff was caused by an extraordinary event, a fire and a freshet; and the court held that the defendants, although guilty of negligent delay, were not responsible, because the event was not one which would reasonably be anticipated. In the case at bar, the event which caused the loss was contemplated by the parties when they made their contract as a probable consequence of the breach of it.

The case before us is distinguishable from Ingledew *v.* Northern Railroad, 7 Gray, 86. In that case the opinion is based upon the ground, that it did not appear that "the defendants assumed any duty in relation to the delivery of the boxes to another carrier," or that they "were charged with any duty in forwarding the ink to Keene, or that the officers of the defendant corporation knew of its destination beyond their own line." The facts of the two cases are

different, and for the reasons above stated we are of opinion that different rules of damages are to be applied in them, and that in the case at bar, upon the facts which he offered to prove, the plaintiff is entitled to recover the damage which he sustained by reason of the freezing of the apples between Portland and Bangor. *Exceptions sustained.*

HOBBS *v.* LONDON & SOUTHWESTERN RAILWAY

Queen's Bench, 1875. L. R. 10 Q. B. 111.

Cockburn, C.J. We are of opinion that this rule should be made absolute as regards the £20 damages given in respect of the consequences of the wife having caught cold in this walk from Esher to Hampton; but that it should be discharged as regards the £8 in respect to the personal inconvenience suffered by the husband and the wife in consequence of their not being taken to, or put down at their proper place of destination.

The facts are simple. The plaintiffs took tickets to be conveyed from the Wimbledon station of the defendants' railway to Hampton Court. It so happened that the train did not go to Hampton Court, and the plaintiffs were taken on to Esher Station, which increased the distance which they would have to go from the railway station to their home by two or three miles.

Damages were asked for upon two grounds: first, for the inconvenience that the husband and wife, with their two children, sustained by having to go this distance, the night happening to be a wet night; in the second place, damages were asked by reason of the wife, from her exposure to the wet on that night, getting a bad cold and being ill in health, the consequence of which was that some expense was incurred in medical attendance upon her. We think these two heads of damage must be kept distinct, and I propose to deal with them as distinct subjects.

With regard to the first, there can be no doubt whatever upon the facts that the plaintiffs were put to personal incon-

venience: they had to walk late at night, after twelve o'clock, a considerable distance, the wife suffered fatigue from it, and they had to carry their children or to get them along with great difficulty, the children being fatigued and exhausted; and there is no doubt that there was personal inconvenience suffered by the party on that occasion, and that inconvenience was the immediate consequence and result of the breach of contract on the part of the defendants. The plaintiffs did their best to diminish the inconvenience to themselves by having recourse to such means as they hoped to find at hand; they tried to get into an inn, which they were unable to do; they tried to get a conveyance; they were informed none was to be had; and they had no alternative but to walk; and therefore it was from no default on their part, and it cannot be doubted that the inconvenience was the immediate and necessary consequence of the breach of the defendants' contract to convey them to Hampton Court. Now inasmuch as there was manifest personal inconvenience, I am at a loss to see why that inconvenience should not be compensated by damages in such an action as this. It has been endeavored to be argued, upon principle and upon authority, that this was a kind of damage which could not be supported; and attempts were also made to satisfy us that this supposed inconvenience was more or less imaginary, and would depend upon the strength and constitution of the parties, and various other circumstances; and that it is not to be taken that a walk of so many additional miles would be a thing that a person would dislike or suffer inconvenience from; and that there may be circumstances under which a walk of several miles, so far from being matter of inconvenience, would be just the contrary. All that depends on the actual facts of each individual case; and if the jury are satisfied that in the particular instance personal inconvenience or suffering has been occasioned, and that it has been occasioned as the immediate effect of the breach of the contract, I can see no reasonable principle why that should not be compensated for. The case of Hamlin *v.* Great Northern Ry. Co., 1 H. & N. 408; 26 L. J. (Ex.) 20, was cited as an

authority to show that for personal inconvenience damages ought not to be awarded. That case appears to me to fall far short of any such proposition. It merely seems to amount to this: that where a party, by not being able to get to a place which he would otherwise have arrived at in time to meet persons with whom he had appointments, had sustained pecuniary loss, that is too remote to be made the subject of damages in an action upon a breach of contract. That may be perfectly true, because, as in every one of the instances cited, you would have to go into the question whether there was a loss arising from the breach of contract, before you could assess that loss. And, after all, if the true principle be laid down in Hadley *v.* Baxendale, 9 Ex. 341; 23 L. J. (Ex.) 179, the damage must be something which is in the contemplation of the parties as likely to result from a breach of contract; and it is impossible that a company who undertake to carry a passenger to a place of destination can have in their minds all the circumstances which may result from the passenger being detained on the journey. As far as the case of Hamlin *v.* Great Northern Ry. Co. goes, I am far from saying it was a wrong decision; but it did not decide that personal inconvenience, however serious, was not to be taken into account as a subject-matter of damage in a breach of contract of a carrier to convey a person to a particular destination. If it did, I should not follow that authority; but I do not think it applicable to this case at all. I think there is no authority that personal inconvenience, where it is sufficiently serious, should not be the subject of damages to be recovered in an action of this kind. Therefore, on the first head, the £8, I think the verdict ought to stand.

With regard to the second head of damage, the case assumes a very different aspect. I see very great difficulty indeed in coming to any other conclusion than that the £20 is not recoverable; and when we are asked to lay down some principle as a guiding rule in all such cases, I quite agree with my Brother Blackburn in the infinite difficulty there would be in attempting to lay down any principle or rule which shall cover all such cases; but I think that the nearest approach to

anything like a fixed rule is this: That to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. To illustrate that I cannot take a better case than the one now before us: Suppose that a passenger is put out at a wrong station on a wet night and obliged to walk a considerable distance in the rain, catching a violent cold which ends in a fever, and the passenger is laid up for a couple of months, and loses through this illness the offer of an employment which would have brought him a handsome salary. No one, I think, who understood the law, would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable. Here, I think, it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could be fairly said to have been in the contemplation of the parties. As my Brother Blackburn points out, so far as the inconvenience of the walk home is concerned, that must be taken to be reasonably within the contemplation of the parties; because, if a carrier engages to put a person down at a given place, and does not put him down there, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to the place of his destination somehow or other. If there are means of conveyance for getting there, he may take those means and make the company responsible for the expense; but if there are no means, I take it to be law that the carrier must compensate him for the personal inconvenience which the absence of those means has necessitated. That flows out of the breach of contract so immediately that the

damage resulting must be admitted to be fair subject-matter of damages. But in this case the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it: and if in such a case the party recovered damages by reason of the cold caught incidentally on that foot journey, it would be necessary, on the principle so applied, to hold that in the two cases which have been put in the course of the discussion, the party aggrieved would be equally entitled to recover. And yet the moment the cases are stated, everybody would agree that, according to our law, the parties are not entitled to recover. I put the case: Suppose in walking home, on a dark night, the plaintiff made a false step and fell and broke a limb, or sustained bodily injury from the fall, everybody would agree that that is too remote, and is not the consequence which, reasonably speaking, might be anticipated to follow from the breach of contract. A person might walk a hundred times, or indeed a great many more times, from Esher to Hampton without falling down and breaking a limb; therefore it could not be contended that that could have been anticipated as the likely and the probable consequence of the breach of contract. Again, the party is entitled to take a carriage to his home. Suppose the carriage overturns or breaks down, and the party sustains bodily injury from either of those causes, it might be said: "If you had put me down at my proper place of destination, where by your contract you engaged to put me down, I should not have had to walk or to go from Esher to Hampton in a carriage, and I should not have met with the accident in the walk or in the carriage." In either of those cases the injury is too remote, and I think that is the case here; it is not the necessary consequence, it is not even the probable consequence of a person being put down at an improper place, and having to walk home, that he should sustain either personal injury or catch a cold. That cannot be said to be within the contem-

plation of the parties so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences. Therefore, as regards the damages awarded in respect of the wife's cold, the rule must be made absolute to reduce the damages by that amount.

Blackburn, J.[1] I am of the same opinion. I think the rule should be made absolute to reduce the damages to £8 beyond the £2 paid into court, but should not be made absolute any further. The action is in reality upon a contract; it is commonly said to be founded upon a duty, but it is a duty arising out of a contract. It is a contract by which the railway company had undertaken to carry four persons to Hampton Court, and in fact that contract was broken when they landed the passengers at Esher, instead of Hampton Court. The contract was to supply a conveyance to Hampton Court, and it was not supplied. Where there is a contract to supply a thing and it is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for, if it be equally good; or if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had and the best substitute you can get upon the occasion for the purpose. . . . On the first head of damages in this case, I do not see that we can cut down the damages below what the jury have found.

Then comes the further question, whether the damages for the illness of the wife are recoverable; I think they are not, because they are too remote. On the principle of what is too remote, it is clear enough that a person is to recover in the case of a breach of contract the damages directly proceeding from that breach of contract and not too remotely. Although Lord Bacon had, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation; and therefore I agree with what my Lord has said to-day, that you make it a little more definite by saying such damages are recoverable as a man when making

[1] Part of this opinion, and the concurring opinions of Mellor and Archibald, JJ., are omitted.

the contract would contemplate would flow from a breach of it. For my own part, I do not feel that I can go further than that. It is a vague rule, and as Bramwell, B., said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the court, though you cannot draw the precise line, you can say on which side of the line the case is: I do not see the analogy between this case and the case that was suggested, where a railway company made a contract to carry a passenger, and from want of reasonable care they dashed that passenger down and broke his leg, and he recovers damages from them. For such a breach as that, the most direct, immediate consequence is, that he would be lamed. That is the direct consequence of such a breach of contract; but though here the contract is the same, a contract to carry the passenger, the nature of the breach is quite different; the nature of the breach is simply that they did not carry the plaintiff to his destination, but left him at Esher. To illustrate this, — Suppose you expand the declaration, and say: You, the defendants, contracted to carry me safely to Hampton Court, you negligently upset the carriage and dashed me on the ground, whereby I became ill and sick. That is a clear and immediate consequence. The other case is: You contracted to carry me to Hampton Court, you went to Esher, and put me down there, by which I was obliged to get other means of conveyance, for the purpose of getting to Hampton Court; and because I could find no fly or other conveyance, I was obliged, as the only means of getting to Hampton, to walk there, and because it was a cold and wet night, I caught cold, and I became ill. When it is put in that way, there are many causes or stages which there are not in the other.

With regard to the two instances my Lord put, — one, of the passenger, when walking home in the dark, stumbling and breaking his leg; the other, of his hiring a carriage, and the carriage breaking down, — I must say I think they are on the remote side of the line, and further from it than the present case. I do not think it is any one's fault that it

cannot be put more definitely; I think it must be left as vague as ever, as to where the line must be drawn; but I think in each case the court must say whether it is on the one side or the other; and I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was to be left generally to the jury to say whether the damage was too remote or not.

I think, therefore, the rule ought to be made absolute to reduce the damages to the £8 beyond the £2.

Rule accordingly.

McMAHON *v.* FIELD.

Court of Appeal, 1881. 7 Q. B. Div. 591.

Brett, L.J. The question as to the remoteness of damage has become a difficult one since, according to the case of Hadley *v.* Baxendale, 9 Ex. 341; 23 L. J. (Ex.) 179, it is for the court and not the jury to determine whether the case comes within any of the following rules, namely, first, whether the damage is the necessary consequence of the breach; secondly, whether it is the probable consequence; and thirdly, whether it was in the contemplation of the parties when the contract was made. Those two last are rather questions of fact for a jury, than of law for the court, to determine. Now, the question in this case is whether the fact of some of these horses taking cold is within any of those three rules. It was not the necessary consequence of the breach of contract, but I have no doubt that it was the probable consequence, and if so, it follows that it was in the contemplation of the parties within the meaning of the third rule. It is necessary to consider the facts of this case. The jury have found that the cold which the horses took was the result of the breach of contract, and we are asked to say that such a finding was unreasonable, and that the question was one which ought never to have been left to them. The plaintiff had to bring

a number of horses from Ireland to the Rugeley fair, and he had engaged of the defendant stabling for twelve horses. It was the defendant who had afterwards let to some one else the stables which the plaintiff had taken, and who when the plaintiff's horses arrived turned out the horses of that other person and put the plaintiff's horses in. The result of that was what might have been expected; when the other person returned and found his horses had been removed, he caused the plaintiff's horses, nine in number, to be turned out, and in effecting this he had the assistance of one of the defendant's servants. It was then the fair time, and it was next to impossible to find at once stabling elsewhere for nine horses, so that these horses which had just arrived from a railway journey, and were therefore probably feverish, and had been put long enough into stables to have had their clothes removed, were thus put out and exposed to the weather. That is a thing which nobody would do to horses who understood anything about them, as the probability is that they would catch cold. If such a question could be left to a jury, they would find, as this jury did, that it was the probable consequence of such an act as this. Then it is said that the case is governed by that of Hobbs *v.* London and South Western Ry. Co., Law Rep. 10 Q. B. 111. Now, I must confess that if I acquiesce in that case I cannot quite agree with it. What were the facts there? A man with his wife and children took a ticket by the train to Hampton Court, his residence being between two and three miles from Hampton Court. The train did not go to Hampton Court, but took them to Esher Station, where they were turned out at about 12 o'clock on a wet night, and, being unable to get any conveyance or accommodation at an inn, were obliged to walk about six miles to their home. The wife in consequence of the exposure caught a cold, and it was said that such damage was too remote to be recovered. Why was it too remote? There was no accommodation or conveyance to be obtained at Esher at that time of night, so that it was not only reasonable that they should walk, but they were obliged

to do so. Why was it that which happened was not the natural consequence of the breach of contract? Suppose a man let lodgings to a woman, and then turned her out in the middle of the night with only her nightclothes on, would it not be a natural consequence that she would take a cold? Had Esher Station been a large one, and there had been flys which might have been had, or accommodation at an inn, and the passengers had refused such and elected to walk home, I should have thought then that what happened arose from their own fault, but that was not so; yet, nevertheless, the judges who decided Hobbs *v.* London and South Western Ry. Co. decided, as a matter of fact, that the cold was so improbable a consequence that it was not to be left to the jury whether it was occasioned by the breach of contract. It is not, however, necessary for me to say more than that I am not contented with it, for there is a difference between such a case and the present one. People do get out of a train and walk home at night without catching cold, and it is not nearly so inevitable a consequence that a person getting out of a train under such circumstances as in Hobbs *v.* London and South Western Ry. Co. should catch cold, as that horses turned out, as these were in this case, should suffer. There is, therefore, a difference, though I own I do not see much, between this case and that of Hobbs *v.* London and South Western Ry. Co. This appeal ought, I think, to be allowed, and it must be considered that in so deciding we are not deciding contrary to the opinion of Mr. Justice Fry, who thought that the plaintiff ought to be allowed to recover this damage. *Appeal allowed.*[1]

MURDOCK *v.* BOSTON AND ALBANY RAILROAD.

Massachusetts, 1882. 133 Mass. 15.

Morton, C.J. This is an action of contract to recover damages for a breach of the defendant's contract to carry the

[1] Bramwell and Cotton, L.JJ., delivered concurring opinions.

plaintiff as a passenger on its railroad from Springfield to North Adams. It appeared at the trial that the plaintiff bought a ticket at Springfield, which entitled him to be carried to North Adams; that the defendant's conductor refused to receive the ticket, and, when the train arrived at Pittsfield, the conductor, who was a railroad police officer, arrested the plaintiff for evading his fare, and delivered him into the custody of two police officers of Pittsfield, who detained him during the night in the place of detention provided for arrested persons. The learned justice who presided in the Superior Court ruled that the plaintiff was entitled to recover damages for this arrest and imprisonment, for indignities which the plaintiff contended that he suffered at the hands of the Pittsfield police officers, for his mental suffering, and for sickness produced by a cold caught while confined.

The distinction between the rules of damages applicable in actions of contract and of tort appears to have been overlooked at the trial. Without inquiring whether all the elements of damage admitted by the court would be competent, if this had been an action of tort for an assault and false imprisonment, we are of opinion that too broad a rule was adopted in this case. Damages for a breach of a contract are limited to such as are the natural and proximate consequences of the breach, such as may fairly be supposed to enter into the contemplation of the parties when they made the contract, and such as might naturally be expected to result from its violation. The detention of the plaintiff during the night, his discomforts in the place of detention, the cold which he took by reason of the dampness of the cell, and the indignities he suffered from the police officers of Pittsfield, were not the immediate consequences of the breach of the defendant's contract to carry the plaintiff to North Adams. They were the results of intervening causes, not the primary, but the secondary, effects of the breach of contract; and are too remote to come within the rule of damages applicable in an action of contract. Hobbs *v.*

London & Southwestern Railway, L. R. 10 Q. B. 111. The plaintiff's remedy for these wrongs, if proved, is by an action of tort. The defendant was not required to be ready to meet and contest these questions under a declaration alleging a breach of a contract to carry the plaintiff to North Adams.

Exceptions sustained.

R. M. Morse, Jr., for the plaintiff, was first called upon.

G. S. Hale & C. F. Walcott, for the defendant, were not called upon.

BROWN *v.* CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY.

Wisconsin, 1882. 54 Wis. 342.

TAYLOR, J.[1] In this case we deem it material to determine whether the action is an action for a tort, or an action for a breach of the contract to carry the plaintiffs to their destination, because we think the rules of damages in the two actions are essentially different. We hold that the action in this case is based upon the tort of the defendant in negligently and carelessly directing the plaintiffs to leave the cars before they reached their destination.[2]

[1] Part of the opinion is omitted.

[2] Counsel for defendant has discussed at some length the question whether this is an action *ex contractu* or an action *ex delicto*. Inasmuch as the conductor did nothing but what he would have had a right to do had plaintiff had no right to ride on the ticket, it is evident that plaintiff could not have maintained the action at all without pleading and proving his contract with the defendant, and its breach either by malfeasance or non-feasance. In other words, an action could not have been maintained for a tort simply without reference to the contract between the parties. In that sense it is an action arising on a contract. But it is not an action on the contract, properly so called. The gist or *gravamen* of it is a tortious act, which constituted a breach of the contract. It is what is sometimes called "an action for tort founded on contract" or "an action *ex quasi contractu*." In considering the measure of damages and the elements of damage proper to be considered, the courts in this country have almost universally treated such actions as sounding in tort, and have held that the passenger who was wrongfully ejected from the train could

The plaintiffs claim, and the evidence shows, that they and their child, about seven years old, were directed to leave the cars, by the brakeman, at a place some three miles east of Mauston, being told at the time that it was Mauston, their place of destination. When they left the cars it was night; it was cloudy, and had rained the day before; there was a freight train standing on a side track where they were put off the train; there was no platform, and no lights visible except those on the freight train. Plaintiffs soon ascertained that they were not at Mauston, and did not know where they were. They did not see the station-house, although there was one, but it was hid from their view by the freight train standing on the side track. They supposed they were at a place two miles east, where the train sometimes stopped, but where there was no station-house. They started west on the track towards Mauston, expecting to find a house where they might stop, but did not find one until they came to the bridge, about a mile east of Mauston, and then they thought it easier to go on to Mauston than seek shelter at the house, which was a considerable distance from the track. They went on to Mauston, and arrived there late at night, Mrs. Brown

recover all damages sustained by him, as the direct and natural consequence of the wrongful act, such as the indignity of being ejected and injury to the health through exposure to the weather. This is the rule recognized and adopted by this court in Carsten *v.* Railroad Co., 44 Minn. 454, 47 N. W. Rep. 49, and Hoffman *v.* Same, 45 Minn. 53, 47 N. W. Rep. 312. The leading case in England on the subject is the Hobbs Case, L. R. 10 Q. B. 111, which, however, was disapproved in McMahon *v.* Field, 7 Q. B. Div. 591. While the authority of that case has been generally acknowledged, at least nominally, in this country, yet, as Mr. Sedgwick in his work on Damages (section 868) remarks, the practical effect of it has been virtually neutralized in most jurisdictions by holding, as already stated, that actions like the present sound in tort. But it seems to us that very often a great deal of time and learning has been unnecessarily expended in discussing the exact nature of such an action. The important question, after all, is whether the injury was the direct and proximate, or only the remote, consequence of the wrongful expulsion.— MITCHELL, J., in Serwe *v.* Northern Pacific Railroad, 48 Minn. 78, 81 (1892).

quite exhausted from the walk. She was pregnant at the time. She had severe pains during the night, and the pains continued from time to time, and after a few days she commenced flowing. The pains and flowing continued until some time in December, when a miscarriage took place, after which inflammation set in, and for some time she was so sick that she was in imminent danger of dying. The plaintiffs claim that the miscarriage and subsequent sickness were all caused by the walk Mrs. Brown was compelled to take to get from the place where they were left by the train to Mauston.

The important question in the case is, whether the appellant is liable for the injury to Mrs. Brown, admitting that it was caused by her walk to Mauston. Whether the sickness of Mrs. Brown was caused by the walk to Mauston was an issue in the case, and the jury have found upon the evidence that it was caused by the walk. There is certainly some evidence to sustain this finding of the jury, and their finding is therefore conclusive upon this point. Admitting that the walk caused the miscarriage and sickness of the plaintiff Mrs. Brown, it is insisted by the learned counsel for the appellant, that the appellant is not liable for such injury; that it is too remote to be the subject of an action; that the negligence and carelessness of the defendant's employees in putting the plaintiffs off the cars at the place they did, was not the proximate cause of the miscarriage and sickness, and for that reason the appellant company is not liable therefor. . . .

The rules which limit the damages in actions of tort, so far as any general rules can be established, are in many respects different from those in actions on contract. The general rule is, that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done. . . . One who commits a trespass or other wrong is liable for all the damage which legitimately flows directly from such trespass or wrong, whether such damages might have been foreseen by the wrong-doer or not.

As stated by Justice Colt in the case of Hill *v.* Winsor, 118 Mass. 251: "It cannot be said, as a matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough *that it now appears to have been* a natural and probable consequence."

In the case of Bowas *v.* Pioneer Tow Line, 2 Sawy. 21, Judge Hoffman, speaking of the rule in relation to damages on a breach of contract, as contrasted with the rule in case of wrongs, says: "The effect of this rule is more often to limit than to extend the liability for a breach of contract, although sometimes, when the special circumstances under which the contract was made have been communicated, damages consequential upon a breach made under those circumstances will be deemed to have been contemplated by the parties, and may be recovered by the defendant. But this rule, as Mr. Sedgwick remarks, has no application to torts. He who commits a trespass must be held to contemplate all the damage which may legitimately flow from his illegal act, whether he may have foreseen them or not; and so far as it is plainly traceable, he must make compensation for it."

The justice and propriety of this rule are manifest, when applied to cases of direct injury to the person. If one man strike another, with a weapon or with his hand, he is clearly liable for all the direct injury the party struck sustains therefrom. The fact that the result of the blow is unexpected and unusual, can make no difference. If the wrong-doer should in fact intend but slight injury, and deal a blow which in ninety-nine cases in a hundred would result in a trifling injury, and yet by accident produce a very grave one to the person receiving it, owing either to the state of health or other accidental circumstances of the party, such fact would not relieve the wrong-doer from the consequences of his act. The real question in these cases is, Did the wrongful act pro-

duce the injury complained of? and not whether the party committing the act could have anticipated the result. The fact that the act of the party giving the blow is unlawful, renders him liable for all its direct evil consequences.

This was the substance of the decision in the old and often cited squib case of Scott *v.* Shepherd, 2 W. Bl. 892. Justice Nares there says that, "the act of throwing the squib being unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate;" and in this view of the case all the judges agreed, although they differed upon the question as to the form of the action.

In the case at bar, the question to be determined is, whether the negligent act of the defendant's employees in putting the plaintiffs and their child off the train in the night-time, at the place where they did, was the direct cause of the injury complained of by the plaintiffs, or whether it was only a remote cause for which no action lies. We must, in considering this case, take it for granted that the walk from the place where they left the cars to Mauston was the immediate cause of the injury complained of. We think the question whether there was any negligence on the part of the plaintiffs in taking the walk, was properly left to the jury, as a question of fact; and they found that they were guilty of no negligence on their part. They found themselves placed by the wrongful act of the defendant where it became necessary for their protection to make the journey. The fact that there was a station-house near by, at which they might have found shelter until another train came by, is not conclusive that the plaintiffs were negligent in the matter. They were landed at a place where they could not see it, and the jury have found that under the circumstances they were not guilty of negligence in not finding it. The defendant must therefore be held to have caused the plaintiffs to make the journey as the most prudent thing for them to do under the circumstances. And, we think, under the rules of law, the defendant must be liable for the direct consequences of the journey. Had the defendant wrongfully placed the plaintiffs off the train in the open country, where there was

no shelter, in a cold and stormy night, and, on account of the state of health of the parties, in their attempts to find shelter they had become exhausted and perished, it would seem quite clear that the defendant ought to be liable. The wrongful act of the defendant would be the natural and direct cause of their deaths, and it would seem to be a lame excuse for the defendant, that, if the plaintiffs had been of more robust health, they would not have perished or have suffered any material injury.

The defendant is not excused because it did not know the state of health of Mrs. Brown, and is equally responsible for the consequences of the walk as though its employees had full knowledge of that fact. This court expressly so held in the case of Stewart *v.* Ripon, 38 Wis. 591, and substantially in the case of Oliver *v.* Town of La Valle, 36 Wis. 592.

Upon the findings of the jury in this case, it appears that the defendant was guilty of a wrong in putting the plaintiffs off the cars at the place they did; that in order to protect themselves from the effects of such wrong they made the walk to Mauston; that in making such walk they were guilty of no negligence, but were compelled to make it on account of the defendant's wrongful act; and that, on account of the peculiar state of health of Mrs. Brown at the time, she was injured by such walk. There was no intervening independent cause of the injury, other than the act of the defendant. All the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant. We think, therefore, it must be held that the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury, within the decisions above quoted. We can see no reason why the defendant is not equally liable for an injury sustained by a person who is placed in a dangerous position, whether the injury is the immediate result of a wrongful act, or results from the act of the party in endeavoring to escape from the immediate danger.

When by the negligence of another a person is threatened with danger, and he attempts to escape such threatened danger by an act not culpable in itself under the circumstances, the person guilty of the negligence is liable for the injury received in such attempt to escape, even though no injury would have been sustained had there been no attempt to escape the threatened danger. This was so held, and we think properly, in the case of a passenger riding upon a stage-coach, who, supposing the coach would be overturned, jumped therefrom and was injured, although the coach did not overturn, and would not have done so had the passenger remained in his seat. The passenger acted upon appearances, and, not having acted negligently, it was held that he could recover; it being shown that the coach was driven negligently at the time, which negligence produced the appearance of danger. Jones *v.* Boyce, 1 Stark. 493. The ground of the decision is very aptly and briefly stated by Lord Ellenborough in the case as follows: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

So, in the case at bar, the defendant, by its negligence, placed the plaintiffs in a position where it was necessary for them to act to avoid the consequences of the wrongful act of the defendant, and, acting with ordinary prudence and care to get themselves out of the difficulty in which they had been placed, they sustained injury. Such injury can be, and is, traced directly to the defendant's negligence as its cause; and it is its proximate cause, within the rules of law upon that subject. The true meaning of the maxim, *causa proxima non remota spectatur*, is probably as well defined by the late Chief Justice Dixon in the case of Kellogg *v.* Railway Co., 26 Wis. 223, as by any other judge or court. He states it as follows: "An efficient, adequate cause being found, must be considered the true cause, unless some other cause not incident to it, but independent of it, is shown to have intervened between it and the result." . . .

There is, I think, but one case cited by the learned counsel

for the appellant which appears to be in direct conflict with this view of the case, except those which relate to breaches of contract, and that is the Pullman Palace Car Co. *v.* Barker, 4 Col. 344. This case is, we think, unsustained by authority, and is in direct conflict with the decisions of this court in the cases of Stewart *v.* Ripon and Oliver *v.* Town of La Valle, *supra*. This decision is, it seems to me, supported by the principles of neither law nor humanity. It in effect says that, if an individual unlawfully compels a sick and enfeebled person to expose himself to the cold and storm to escape worse consequences from his wrongful act, he cannot recover damages from the wrong-doer, because it was his sick and enfeebled condition which rendered his exposure injurious. Certainly such a doctrine does not commend itself to those kinder feelings which are common to humanity, and I know of no other case which sustains its conclusions.

Judgment affirmed.

COLE, C.J., and LYON, J., dissent.

SQUIRE *v.* WESTERN UNION TELEGRAPH CO.

Massachusetts, 1867. 98 Mass. 232.

TORT for neglect to deliver a telegraphic message seasonably.

At the trial in the Superior Court these facts appeared: The defendants were a corporation established under the laws of New York, having a line of electric telegraph to Buffalo from Albany, where it connected with a line of the American Telegraph Company (a distinct corporation), which ran from Albany to Boston. The plaintiffs were pork dealers at Boston. On March 19, 1866, the firm of Metcalf & Cushing, pork dealers at Buffalo, having on hand two hundred and fifty dressed hogs, wrote to the plaintiffs by mail, offering to sell the lot, and asking them to reply by telegraph how much they would give for it. The plaintiffs replied by telegraph on Saturday, March 24, naming a price which they would pay

for the lot delivered at Boston. Metcalf & Cushing answered by telegraph, declining to sell for that, but naming another price which they would accept for the lot delivered in the cars at Buffalo. Upon receiving this offer, the plaintiffs prepared a reply as follows: "Will take your hogs at your offer; our man will be there Tuesday morning." . . . This reply, addressed to "Metcalf & Cushing, Buffalo, N. Y.," and dated "Boston, March 24, 1866," the plaintiffs delivered at the office of the American Telegraph Company in Boston, about half past six o'clock on Saturday evening, for transmission as an unrepeated message not specially insured; and at the same time they paid to the American Telegraph Company the price for sending it the whole way to Buffalo. That company immediately transmitted the body of the message (not including the printed terms) to the defendants' office in Albany; and the defendants sent it from Albany to their office in Buffalo, where it arrived about nine o'clock Saturday evening. The defendants' office hours at Buffalo, for receiving and delivering messages, were from eight o'clock in the morning till ten o'clock in the evening. The residences and place of business of the members of the firm of Metcalf & Cushing were all within ten minutes' walk from that office; and the defendants' agent at Buffalo was acquainted with them. But, through his negligence, the message was not delivered on the evening of its arrival, and was kept in the office during Sunday and until Monday morning, when it was delivered to Metcalf & Cushing at twenty minutes past eleven o'clock. Until eleven o'clock Metcalf & Cushing had been willing and able to close the bargain with the plaintiffs; but at that hour, not having received from the plaintiffs any reply, they sold and delivered the hogs to another party.[1]

Bigelow, C.J. A party who has failed to fulfil a contract cannot be held liable for remote, contingent, and uncertain consequences, or for speculative or possible results which may have ensued on his breach of duty, although they may be traceable to that cause. The reason is, that damages of such

[1] Part of the statement of facts and of the opinion are omitted.

a nature are not the natural or necessary incidents of a contract, and cannot be deemed to have been within the contemplation of parties when they agreed together. A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service would be a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform and to the compensation paid and received therefor. The practical rule, founded on a wise policy, and at the same time consistent with good sense and sound equity, is that a party can be held liable for breach of a contract only for such damages as are the natural or necessary, and the immediate and direct results of the breach, — such as might properly be deemed to have been in contemplation of the parties when the contract was entered into, — and that all remote, speculative, and uncertain results, as well as possible profits and advantages and other like consequences which might have arisen from the fulfilment of the contract must be excluded, as forming no just or legitimate basis on which to determine the extent of the injury actually caused by a breach. Fox *v.* Harding, 7 Cush. 516. Cutting *v.* Grand Trunk Railway Co., 13 Allen, 381–384, and cases cited. In the latter case it was held that a carrier who had negligently delayed to transport and deliver goods intrusted to him, was liable in damages for the difference in their value at the time when and place where they ought to have been delivered, and their market value at the same place on the day when they were delivered. This was held to be the measure of damages, because such a change in value was the direct result of the delay in performing the contract, and might well be supposed to have been in contemplation of the parties when the contract was made. We can see no reason why an analogous rule is not applicable to the case before us. The defendants as a contracting party are liable for the injury actually caused

by their breach of duty. There is nothing in the nature of the business, which they undertake to carry on, that should exempt them from making compensation for any neglect or default on their part. Ellis *v.* American Telegraph Co., 13 Allen, 226. The only question then is as to the effect of the application of the general rule of damages already stated to the contract between the parties. This necessarily depends on the subject-matter. The defendants undertook to transmit a message which on its face purported to be an acceptance of an offer for the sale of merchandise. The agreement was to transmit and deliver it with reasonable diligence and despatch, having reference to the ordinary mode of performing similar service by persons engaged in the same business. The natural consequence of a failure to fulfil the contract was that the party to whom the message was addressed, not receiving a reply to his offer to sell the merchandise in due season, would dispose of it to another person; that the plaintiff might be unable to procure an article of like kind and quality at the same price, and in order to obtain it would be obliged to pay a higher price for it in the market than he would have paid if the prior contract for its purchase had been completed by the seasonable delivery of his message by the defendants. The sum therefore which would compensate the plaintiffs for the loss and injury sustained by them would be the difference, if any, in the price which they agreed to pay for the merchandise by the message which the defendants undertook to transmit, if it had been duly and seasonably delivered in fulfilment of their contract, and the sum which the plaintiffs would have been compelled to pay at the same place in order by the use of due diligence to have purchased the like quantity and quality of the same species of merchandise. The case must be tried anew, and if it is found that the defendants did not fulfil their contract, the damages must be assessed according to the rule above stated.

Exceptions sustained.

WESTERN UNION TELEGRAPH CO. *v.* HYER.

Florida, 1886. 22 Fla. 637.

The appellees, ship-brokers, residing in Pensacola, having been engaged by a customer to charter a vessel to carry a cargo of lumber from Pensacola to the United Kingdom, sent a telegram to their correspondent in Barbadoes, making an offer for the charter of a vessel. The offer was accepted, and a telegram sent appellees, which was received at the defendant company's office in Pensacola the next day, but which was never delivered to appellees. Their correspondent in Barbadoes, as their agent, signed the usual charter-party for appellees. Not receiving an answer to their despatch, they told their customer that they had failed to charter the vessel, whereupon he chartered another. Two weeks afterwards the vessel came to Pensacola, as per the charter-party signed by their agent in Barbadoes. They were compelled to recharter it at a loss. All the despatches were in cipher.[1]

McWhorter, C.J.[2] The courts in New York, Minnesota, Maryland, Wisconsin, Massachusetts, Nevada, and Maine, following the case of Hadley *v.* Baxendale, hold that only nominal damages can be recovered from the company undertaking to send the telegram, unless the sender should inform the operator of the special circumstances which constituted its importance, and the need of its correct and prompt transmission. . . . The decision in Hadley *v.* Baxendale was proper and suited to the facts before the court, but an attempt to extend it to such cases as this would be productive of great injustice. The telegraphic invention has made the system the means of communication between all civilized countries on the globe for a large part of the transactions and communication that prior to its invention were conducted by writing or

[1] This statement of facts, excepting the last clause, is taken from the syllabus prepared by the court.

[2] Part of the opinion is omitted.

by special messenger. No man can enumerate the vast number of subjects of treaty and intercourse that the complicated relations of mankind require its agency to accomplish. It can safely be said, however, that the larger part of all messages sent are of a commercial or business nature which suggest value. The requirements of friendship or pleasure can await other means of less celerity and less expense. If this be true, why should the law assume that as a rule all messages sent over it are unimportant, and that an important one is an exception, of which the operator is to be informed? Whatever may be the rules of this particular defendant company, if they have any, there are none set forth in the record. Whether, therefore, its rules are reasonable, or whether it can limit its liability by proper rules, when shown to have been known to its patrons, is in no sense involved in this opinion.

The common carrier charges different rates of freight for different articles, according to their bulk and value, and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower as the importance of the despatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that if its importance had been disclosed to the operator, that he was required, by the rules of the company, to send the message out of the order in which it came to the office, with reference to other messages awaiting transmission; that he was to use any extra degree of skill, and different method or agency, for sending it, from the time, the skill used, the agencies employed, or the compensation demanded for sending an unimportant despatch; or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action, or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he de-

manded, which in consideration thereof he had agreed to perform, and which the law, in consideration of his promise, and the reception of the consideration therefor, had already enjoined on him. . . .

It is of no consequence whether the despatch is in plain English or in cipher, provided such cipher is written in the letters of the English alphabet.

RANEY, J., dissented. *Judgment affirmed.*[1]

POSTAL TELEGRAPH CABLE CO. *v.* LATHROP.

Illinois, 1890. 131 Ill. 575.

WILKIN, J. It is earnestly contended by counsel for appellant, that the messages, "Please buy, in addition to thousand August, one thousand cheapest month," and "Put stop order on five thousand December, at seventeen cents," were, unexplained, meaningless and unintelligible to the operator of appellant who transmitted them, and therefore, as in case of cipher despatches, no special or consequential damages could have been reasonably contemplated by the parties when they were sent, and hence none can be recovered in this suit. This position is based on the rule of damages announced in Hadley *v.* Baxendale, and followed generally in this country, as well as England. In any view of that rule, as applied to this case, the instruction is too narrow. The evidence shows that at the time of sending these despatches, appellees were, and had for some time prior thereto been, engaged in the business of jobbers in coffee, tea, and sugar in the city of Chicago; that Crossman & Bro. were commission merchants in New York, buying and selling coffee, rubber, and hides, on commission; that appellant had a branch office near the place of business of appellees, from which the messages in question were sent, and had frequently sent others pertaining to their business.

[1] This case was overruled (Mabry, J., dissenting) by W. U. T. Co. *v.* Wilson, 32 Fla. 527.

It also tends to show, that from business transactions in New York between appellant and the firm of Crossman & Bro., appellant knew the business in which the latter firm was engaged. It is in proof, that during the month of June, 1887, and prior to the first mistake complained of, a number of despatches were sent by appellees to Crossman & Bro. from appellant's Chicago office. One on the 13th read: "Please wire us to-day whether you do or do not execute our order for five thousand bags, as we must place it elsewhere if you decline." Another of the same date refers to "five thousand bags." It must at least be conceded that there is evidence tending to show, that from their previous dealings appellant knew, or might by reasonable diligence have understood, the purport of these messages. Therefore, in determining whether or not the messages were sufficient to inform the operator of their meaning, and of the possible risk of loss to appellees by a mistake in transmitting them, the jury should have been left free to consider all the facts and circumstances proved in the case, bearing on that question, whereas the instruction limits the inquiry to that which appears in the despatches themselves, and to such facts as may have been disclosed by the plaintiffs to the defendant or its agent at the time they were sent. See 2 Thompson on Negligence, p. 857.

On the question as to how far mere indefiniteness in the language of a message will defeat a recovery for consequential damages against a telegraph company, the decisions cannot be said to be harmonious. Counsel for appellant contends that the better line of authorities sustains the rule announced in this instruction, viz., that the operator who transmits a message must be able to understand its meaning as to quantity, quality, price, etc., as the sender and party to whom it is sent themselves understood it, otherwise it is said he cannot reasonably be supposed to have contemplated damages as the probable consequence of a failure to correctly transmit it. While some of the cases cited go to that extent, especially where the message is in cipher, another

line of decisions, and, we think, founded on the better reasons, hold that where enough appears in the message to show that it relates to a commercial business transaction between the correspondents, it is sufficient to charge the company with damages resulting from its negligent transmission.

In United States Telegraph Co. *v.* Wenger, 55 Pa. St. 262, a message read, "Buy fifty (50) Northwestern, fifty (50) Prairie du Chien, limit forty-five (45)." There was a delay by the telegraph company in its delivery, resulting in a loss to the sender on account of the advance in price of Chicago and Northwestern Railway Company stock, and the Milwaukee and Prairie du Chien Railway Company stock, which the message was intended to order purchased. The Supreme Court of Pennsylvania sustained a recovery, saying: "The despatch was such as to disclose the nature of the business to which it related, and that loss might be very likely to occur if there was a want of promptitude in transmitting it, containing the order."

In Tyler *v.* Western Union Telegraph Co., 60 Ill. 421, the message was, "Sell one hundred (100) Western Union; answer price." The message as delivered read: "Sell one thousand (1000)," instead of "one hundred (100)." The message was intended as an order to sell one hundred shares of stock in Western Union Telegraph Company. The agent, obeying the order as delivered, sold one thousand shares of said stock, and to fill the order was compelled to buy nine hundred (900) shares. We held that the plaintiff was entitled to recover the difference between the price for which the shares of stock were sold and that which he was compelled to pay for those purchased. On the question as to the sufficiency of the despatch to inform the agent of the transaction to which it referred, so as to charge the telegraph company with resulting damages, the rule announced in United States Telegraph Co. *v.* Wenger, *supra*, was approved, and it was held that the despatch disclosed the nature of the business as fully as the case demanded. On a second appeal, — 74 Ill. 168, — by general language the decision is re-affirmed.

In Telegraph Co. *v.* Griswold, 37 Ohio St. 302, a despatch read, "Will you give one fifty for twenty-five hundred at London; answer at once, as I have only till to-night." As delivered, it read "one five," instead of "one fifty." As written, it was an inquiry whether the sendee would pay $1.50 in gold for 2500 bushels of flax seed at London, Ontario, the parties having previously corresponded on the subject. The sendee replied to the despatch as received, ordering the purchase, and he recovered from the telegraph company the difference in price. On appeal to the Supreme Court, it was contended, as it is here, that the message was indefinite, and therefore the recovery below unauthorized. But the court said: "It appeared upon its face that it related to a business transaction, — a transaction involving the purchase and sale of property. The company was therefore apprised of the fact that a pecuniary loss might result from an incorrect transmission of the message. Where this appears, there is no such obscurity as relieves the company from liability for negligently failing to transmit and deliver a message in the language in which it was received."

In Marr *v.* Western Union Telegraph Co., 85 Tenn. 530, a message was delivered to the company reading, "Buy one hundred shares Memphis and Charlestown." As delivered, it read, "Buy one thousand shares Memphis and Charlestown." The recovery for consequential damages was sustained, the Supreme Court of that State saying: "This message was so written that the slightest reflection would enable the operator who undertook its transmission, to see its commercial importance, and put him on his guard against error."

In Western Union Telegraph Co. *v.* Blanchard, 68 Ga. 299, the message sent read, "Cover two hundred September, one hundred August." By an error in its transmission, as received it read "two hundred August," instead of "one hundred." As sent, it was an order to sell one hundred bales of cotton for August delivery, and two hundred for September delivery. The agent sold two hundred bales for

August, and plaintiff was compelled to buy one hundred at a loss in order to meet the sale. A recovery for this loss was sustained by the Supreme Court of that State in the following language: "As to the fifth ground in the request to charge, we do not see but what the message sought to be transmitted was, according to the proof, an ordinary commercial message, intelligible to those engaged in cotton dealing, and we can see no special purpose intended by the sender which was unknown to the company, so as to vary the rule of liability. There was at least enough known to show it was a commercial message of value, and that is sufficient." See, also, Squire *v.* Union Telegraph Co., 98 Mass. 232; Pepper *v.* Western Union Telegraph Co., 4 Tenn. 660; Sutherland on Damages.

All the cases which hold that a telegraph company is not liable for consequential damages for a failure to transmit a despatch as received, on the ground of indefiniteness or obscurity in the language of the message, do so upon the ground that unless the agent of the company may reasonably know from the message itself, or is informed by other means, that it relates to a matter of business importance, he cannot be supposed to have contemplated damages as a result from his failure to send it as written, as in the case of cipher despatches. The Supreme Court of Wisconsin, in Condee *v.* Western Union Telegraph Co., 34 Wis. 472, say: "The operator, who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damage will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of a trifling and unimportant character."

It is clear enough, that, applying the rule in Hadley *v.* Baxendale, a recovery cannot be had for a failure to correctly transmit a mere cipher despatch, unexplained, for the reason that to one unacquainted with the meaning of the

ciphers it is wholly unintelligible and nonsensical. An operator would, therefore, be justifiable in saying it can contain no information of value as pertaining to a business transaction, and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss. The messages in this case, however, are not cipher despatches. Their language is plain and intelligible to every one who can read, so far as they purport to disclose the business to which they relate. They are abbreviations, and clearly indicate that they relate to business transactions between the sender and sendee. The first message, "Please buy, in addition to thousand August, one thousand cheapest month," was notice to the agent at Chicago that appellees were ordering their agents in New York to purchase merchandise for them. We do not agree with counsel in saying that it might as well be construed to be an order "for a thousand toothpicks or a thousand papers of pins, as anything else." Every one of intelligence knows that such articles are not purchased in that way. Suppose, however, that the agent was not informed as to the quantity, quality, and value of the merchandise to be purchased, by the message, would that justify him in contemplating, within the rule in the Hadley case, no damages as a result of his negligence or omission of duty in promptly and correctly sending it forward? It certainly cannot be contended that the agent must be informed of all the facts and circumstances pertaining to a transaction referred to in a telegram, which are known by the parties themselves, to make his company liable for more than nominal damages. If it should be so held, the telegraph would cease to be of practical utility in the commercial world.

It is not easy to state a case in which it can be said the parties contemplated, at the time of contracting, all the damages which would probably result from a failure to perform the contract. We think the reasonable rule, and one well sustained by authority, is, that where a message, as written, read in the light of well-known usage in commercial

correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written, within a reasonable time, unless such negligence is in some way excused. Under this rule, both despatches, as presented to appellant's operator, were sufficiently explicit to charge it with the loss sustained by appellees, resulting from what has been found by the jury inexcusable mistakes.

Judgment affirmed.

PRIMROSE *v.* WESTERN UNION TELEGRAPH COMPANY.

United States Supreme Court, 1894. 154 U. S. 1.

THIS was an action on the case, brought Jan. 25, 1888, by Frank J. Primrose, a citizen of Pennsylvania, against the Western Union Telegraph Company, a corporation of New York, to recover damages for a negligent mistake of the defendant's agent in transmitting a telegraphic message from the plaintiff at Philadelphia to his agent at Waukeney in the State of Kansas.

The defendant pleaded: 1st, not guilty; 2d, that the message was an unrepeated message, and was also a cipher and obscure message, and therefore by the contract between the parties under which the message was sent the defendant was not liable for the mistake.[1]

GRAY, J. Under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contem-

[1] The statement of facts and part of the opinion are omitted.

plated, when making the contract, as likely to result from its breach. This was directly adjudged in Western Union Tel. Co. *v.* Hall, 124 U. S. 444. . . .

In Sanders *v.* Stuart, which was an action by commission merchants against a person whose business it was to collect and transmit telegraph messages, for neglect to transmit a message in words by themselves wholly unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for goods, whereby the plaintiffs lost profits, which they would otherwise have made by the transaction, to the amount of £150, Lord Chief Justice Coleridge, speaking for himself and Lords Justices Brett and Lindley, said: "Upon the facts of this case we think that the rule in Hadley *v.* Baxendale applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the case might be, if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be 'reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it;' for the simple reason that the defendant, at least, did not know what his contract was about, nor what, nor whether any, damage would follow from the breach of it. And for the same reason, viz., the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and, indeed, intentionally procured by the plaintiffs), the first portion of the rule applies also; for there are no damages more than nominal which can 'fairly and reasonably be considered as arising naturally, *i. e.*, according to the usual course of things, from the breach' of such a contract as this." 1 C. P. D. 326, 328; 45 Law Journal (N. S.) C. P. 682, 684.

In United States Telegraph Company *v.* Gildersleve,

which was an action by the sender against a telegraph company for not delivering this message received by it in Baltimore, addressed to brokers in New York, "Sell fifty (50) gold," Mr. Justice Alvey, speaking for the Court of Appeals of Maryland, and applying the rule of Hadley v. Baxendale, above cited, said: "While it was proved that the despatch in question would be understood among brokers to mean fifty thousand dollars of gold, it was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars, as fifty thousand dollars, by those not initiated. And if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this despatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But without referrence to the fact as to whether the appellant had knowledge of the true meaning and character of the despatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the court committed error, and that its ruling should be reversed." 29 Maryland, 232, 251.

In Baldwin v. United States Tel. Co., which was an action by the senders against the telegraph company, for not delivering this message, "Telegraph me at Rochester what that well is doing," Mr. Justice Allen, speaking for the Court of Appeals of New York, said: "The message did not import that a sale of any property, or any business transaction, hinged upon the prompt delivery of it, or upon any answer that might be received. For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cipher, or in an unknown tongue. It indi-

cated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance." "The despatch not indicating any purpose, other than that of obtaining such information as an owner of property might desire to have at all times and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an under value, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would, naturally and necessarily, result from the failure to deliver the message, would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant." 45 N. Y. 744, 749, 750, 752. See also Hart *v.* Direct Cable Co., 86 N. Y. 633.

The Supreme Court of Illinois, in Tyler *v.* Western Union Tel. Co., took notice of the fact that in that case "the despatch disclosed the nature of the business as fully as the case demanded." 60 Illinois, 434. And in the recent case of Postal Tel. Co. *v.* Lathrop, the same court said: "It is clear enough that, applying the rule in Hadley *v.* Baxendale, *supra*, a recovery cannot be had for a failure to correctly transmit a mere cipher despatch unexplained, for the reason that to one unacquainted with the meaning of the

ciphers it is wholly unintelligible and nonsensical. An operator would, therefore, be justifiable in saying that it can contain no information of value as pertaining to a business transaction; and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss." 131 Illinois, 575, 585.

The same rule of damages has been applied, upon failure of a telegraph company to transmit or deliver a cipher message, in one of the Wisconsin cases cited by the plaintiff, and in many cases in other courts. Candee *v.* Western Union Tel. Co., 34 Wisconsin, 471, 479–481; Beaupré *v.* Pacific & Atlantic Tel. Co., 21 Minnesota, 155; Mackay *v.* Western Union Tel. Co., 16 Nevada, 222; Daniel *v.* Western Union Tel. Co., 61 Texas, 452; Cannon *v.* Western Union Tel. Co., 100 No. Car. 300; Western Union Tel. Co. *v.* Wilson, 32 Florida, 527; Behm *v.* Western Union Tel. Co., 8 Bissell, 131; Western Union Tel. Co. *v.* Martin, 9 Bradwell, 587; Abeles *v.* Western Union Tel. Co., 37 Missouri App. 554; Kinghorne *v.* Montreal Tel. Co., 18 Upper Canada Q. B. 60, 69.

In the present case, the message was, and was evidently intended to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance, or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising, according to the usual course of things, from the supposed breach of the contract itself, or as having been in the con-

templation of both parties, when they made the contract, as a probable result of a breach of it.

In any view of the case, therefore, it was rightly ruled by the Circuit Court that the plaintiff could recover in this action no more than the sum which he had paid for sending the message. *Judgment affirmed.*

FULLER, C.J., and HARLAN, J., dissented.

CHAPTER VI.

AVOIDABLE CONSEQUENCES.

LOKER *v.* DAMON.

Massachusetts, 1835. 17 Pick. 284.

Trespass *quare clausum.* The declaration set forth, that the defendants destroyed and carried away ten rods of the plaintiff's fences, in consequence of which certain cattle escaped through the breach and destroyed the plaintiff's grass, and that he thereby lost the profits of his close from September, 1832, to July, 1833.[1]

Shaw, C. J. The court are of opinion, that the direction respecting damages was right. In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open and passes it frequently, and wilfully and obstinately or through gross negligence leaves it open all summer, and cattle get in, it is his own folly. So if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote.

[1] The statement of facts and part of the opinion are omitted.

We think the jury were rightly instructed, that as the trespass consisted in removing a few rods of fence, the proper measure of damage was the costs of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence. I do not mean to say, that other damages may not be given for injury in breaking the plaintiff's close, but I mean only to say, that in the actual circumstances of this case, the cost of replacing the fence, and not the loss of an ensuing year's crop, is to be taken as the rule of damages, for that part of the injury which consisted in removing the fence and leaving the close exposed.

Judgment on the default, for the sum of $1.50 *damages.*

WOLF *v.* STUDEBAKER.

Pennsylvania, 1870. 65 Pa. 459.

THOMPSON, C.J.[1] We have no question before us involving the fact of an agreement between the plaintiff and defendant, by which the latter agreed to let to the former, on the shares, her farm for one year, from the 1st of April, 1867. The verdict has settled that fact in favor of the plaintiff. The only question before us, therefore, is that relating to damages for the breach of the contract to give possession by the defendant.

The plaintiff claimed to recover the value of his contract, that is to say, what he might reasonably have made out of it, for his damages. In Hoy *v.* Gronoble, 10 Casey, 10, which, like the case in hand, was to recover damages for a failure, on part of the defendant, to deliver possession of the farm which he had agreed to let to the plaintiff to farm on the shares, the rule as to damages is thus stated in the opinion of the court by Strong, J.: "We cannot say, therefore, that the jury were misled in this case by being told that the damages of the plaintiff should be measured by what he

[1] Part of the opinion is omitted.

could have made on the farm. This was but another mode of saying that he was entitled to the value of his bargain." This, as a rule, does not seem to have been controverted by the defendant. But she was permitted to prove, under objection, in mitigation of damages, by one Abraham May, as follows: —

"Wolf was engaged in hauling for the bridge in the summer of 1867; he commenced hauling in June, and continued up to the cold weather; before this he was working lots around; after this he marketed some. Wolf and I looked over his books at one time, and his earnings amounted to about $1000; he hauled after this; he hauled hay to his own stable, and some to Bowman's in the latter part of March; his property consists of a house and stable, and about a quarter of an acre of land; I was at Wolf's sale," &c.

The earnings of this man in this way, it was thought by the learned judge, should to the extent of them mitigate the damages arising from the defendant's broken contract; in other words, the logic seemed to be that because he was an industrious man, he was not within the same rule of compensation that one not so would be. There are undoubtedly cases in which such facts do mitigate damages. Such commonly occur in cases of the employment of clerks, agents, laborers, or domestic servants, for a year or a shorter determinate period. But I have found no case where a disappointed party to a contract for a specific thing or work, who, taking the risk from necessity, of a different business from that which his contract if complied with would have furnished, and shifting for himself and family for employment for them and his teams, is to be regarded as doing it for the benefit of a faithless contractor. It seems to me, therefore, that the rule upon which the testimony quoted was admitted was wrested from its legitimate purpose, and applied to an illegitimate one. In 2 Greenlf. Ev. § 261 a, the distinction is marked between "contracts for specific work and contracts for the hire of clerks, agents, laborers, and domestic servants for a year or shorter determinate periods." In that

case the learned author shows that the defendant may prove, on a breach of the contract, "either that the plaintiff was actually engaged in other profitable service during the term, or that such employment was offered to him, and he rejected it."

There is an evident distinction between such a hiring and a contract for the performance of some specific undertaking. In the one case, the party can earn and expect to earn no more than single wages, and if he gets that, his loss will generally be but nominal. King *v.* Steiren, 8 Wright, 99, was of this nature. Whereas, in the other case the loss of the party is the loss of the benefits of the contract he is prepared to perform. In Costigan *v.* The Railroad Company, 2 Denio, 609, in a case of hiring for personal service, where the party was dismissed before his term had expired, it was held he was not obliged to seek employment, nor perform services offered him of a different nature from that he had engaged to perform, in order to recover full damages for disappointment. In analogy to this principle, I would say, that where a disappointed contractor for the performance of a specified thing finds something of a different nature from his contract to do, his doing it ought not to mitigate the damages for the breach of his contract by the other party. Indeed, there is enough in the difficulty of applying such a rule to discard it. It would necessarily involve proof of everything, great and small, no matter how various the items done by the plaintiff during the period of the contract might be, and how much he made in the mean time. It happened in this case, that a witness saw the plaintiff's book, and testifies from it that he had earned $1000. The expense incurred in earning it, he did not see, or, if he did, did not disclose. But this single case ought not to furnish a rule in other cases. It cannot be that results utterly unconnected with the cause of action and the party sued can be made to tell to his advantage. . . .

We think that that which should mitigate damages in a contract like that we are considering should be something resulting from the acts of the party occasioning the injury,

or from the contract itself. The damages may be said to be fixed by the law of the contract the moment it is broken, and I cannot see how that is to be altered by collateral circumstances, independent of, and totally disconnected from it, and from the party occasioning it.

Judgment reversed.

SIMPSON *v.* KEOKUK.

Iowa, 1872. 34 Ia. 568.

ACTION to recover damages suffered by the plaintiffs, for the alleged careless and negligent manner in which the defendant had constructed the gutters and drains in the streets and alleys on which plaintiffs' property abutted.

COLE, J.[1] The plaintiffs' lots were lower than the grade of the streets and alleys; by doing some filling in the lots near the alley, and making a drain, much, if not all, of plaintiffs' damage might have been avoided. If the plaintiffs, by the use of ordinary diligence and efforts, and at a moderate expense, might have prevented the damage, it seems necessarily to follow, that their negligence contributed to the injury; and this, upon a well-settled rule, would defeat the plaintiffs' recovery. We do not intimate that it would have been the duty of plaintiffs to interfere with the streets or gutters, so as to change the construction of them.

Reversed.

INDIANAPOLIS, BLOOMINGTON, AND WESTERN RAILWAY *v.* BIRNEY.

Illinois, 1874. 71 Ill. 391.

WALKER, J.[1] We perceive nothing in this case to take it out of the general rule, that a party suing for an injury received can only recover such damages as flow from and are the immediate result of that injury. Damages produced by

[1] Part of the opinion is omitted.

other agencies than those causing the injury, or even by agencies remotely connected with those causing the injury, cannot be awarded as proximate or proper compensation, but only where the injury flows from the wrongful act as its natural concomitant, or as the direct result thereof. Where speculation or conjecture has to be resorted to, for the purpose of determining whether the injury results from the wrongful act or from some other cause, then the rule of law excludes the allowance of damages for such injury.

Did the sickness and loss of time proved in this case naturally result from the failure of the train to stop for appellee? That is the only wrongful act charged to appellant. The walk by appellee to the next station was not a natural sequence to the failure of the agents of the company to stop the train for him to get aboard. That he should be delayed in reaching that point was a natural consequence, as there was no other known means by which the space could be overcome in so short a time as by a train of cars; but that appellee should walk through the extreme cold to that point, and thus injure his health, was by no means a necessary result. He had his option to remain five or six hours, and take the next train, or procure a horse, or a horse and carriage, and thus have arrived much sooner, and all persons of even small prudence and judgment know, with less exposure to his health; and, being a physician, he must have known that he was incurring increased hazard to his health when he determined to walk instead of riding, and that he was incurring a large amount of discomfort, when, by awaiting the next train or procuring a vehicle and horse, he could have gone in comparative comfort and free from risk to his health.

Had he procured a carriage and horses to make the trip, the company would no doubt have been liable for reasonable compensation for its use and for a driver, or had he awaited the next train, and gone on it, he would have been entitled to nominal damages at least, and could have recovered for all such actual damages as he could have proved in the way of necessarily increased expenses whilst awaiting the arrival of

the train, and loss by being unable to visit patients who required his medical advice, or injury or loss he may have actually sustained in his business, occasioned by the delay; but he had no right to inflict injury upon himself to enhance damages he sought to recover from the road. Having been wrongfully left by the train, if he supposed his business was so urgent as to prevent his awaiting the next train, he should have used all precautions in so making the journey as to produce the least injury to himself that reason would dictate. He had no right to act with recklessness or wantonly, and then claim compensation for the injury thus inflicted. Had he attempted to walk to the next station barefoot, and his feet had been frozen, would any sane man believe he could have recovered for such injury? We presume not, because all would say that it was voluntary wantonness. Then, if two other modes presented themselves, almost perfectly safe from injury, as was the case here, and another, attended with great hazard from the exposure to extreme cold and overexertion, as all reasonable persons must know, why should he be rewarded for disregarding his safety and the consequent injury? The injury by journey on foot was unnecessarily incurred — was not the necessary consequence of being left by the train, but was unnecessarily, if not recklessly, induced. It was the improper, voluntary act of appellee, and for it he has no right to recover. He must be confined to the proximate and natural damages resulting from the wrong of the company. This act is as disconnected from the wrong of the company as would have been a loss by a robbery on his way to the next station, or the destruction of his house by fire after he was left by the train and before he reached home, as it might be inferred by a lively imagination that neither would have occurred, or they could have been prevented, had he reached home on the train that failed to stop for him.

The court erred in refusing to permit appellant to prove that appellee could, had he desired, have procured accommodations until the next or other train should pass to Urbana, or could readily have procured a conveyance for the purpose.

Judgment reversed.

SUTHERLAND *v.* WYER.

Maine, 1877. 67 Me. 64.

Virgin, J. The plaintiff contracted with the defendants to "play first old man and character business, at the Portland museum, and to do all things requisite and necessary to any and all performances which" the defendants "shall designate, and to conform strictly to all the rules and regulations of said theatre," for thirty-six weeks, commencing on Sept. 6, 1875, at thirty-five dollars per week; and the defendants agreed "to pay him thirty-five dollars for every week of public theatrical representations during said season." By one of the rules mentioned, the defendants "reserved the right to discharge any person who may have imposed on them by engaging for a position which, in their judgment, he is incompetent to fill properly."

The plaintiff entered upon his service under the contract, at the time mentioned therein, and continued to perform the theatrical characterizations assigned to him, without any suggestion of incompetency, and to receive the stipulated weekly salary, until the end of the eighteenth week; when he was discharged by the defendants, as they contended before the jury, for incompetency under the rule; but, as the plaintiff there contended, for the reason that he declined to accept twenty-four dollars per week during the remainder of his term of service.

Three days after his discharge and before the expiration of the nineteenth week, the plaintiff commenced this action to recover damages for the defendants' breach of the contract. The action was not premature. The contract was entire and indivisible. The performance of it had been commenced, and the plaintiff been discharged and thereby been prevented from the further execution of it; and the action was not brought until after the discharge and consequent breach. Howard *v.* Daly, 61 N. Y. 362, and cases. Dugan *v.* Anderson, 36 Md.

567, and cases. The doctrine of Daniels *v.* Newton, 114 Mass. 530, is not opposed to this. Neither do the defendants insist that the action was prematurely commenced; but they contend that the verdict should be set aside as being against the weight of evidence.

The verdict was for the plaintiff. The jury must, therefore, have found the real cause of his discharge to be his refusal to consent to the proposed reduction of his salary. The evidence upon this point was quite conflicting. Considering that all the company were notified, at the same time, that their respective salaries would be reduced one-third, without assigning any such cause as incompetency; that no suggestion of the plaintiff's incompetency was ever made to him, prior to his discharge; and that his written discharge was equally silent upon that subject, we fail to find sufficient reason for disturbing the verdict upon this ground of the motion, especially since the jury might well find as they did on this branch of the case, provided they believed the testimony in behalf of the plaintiff.

There are several classes of cases founded both in tort and in contract, wherein the plaintiff is entitled to recover, not only the damages actually sustained when the action was commenced, or at the time of the trial, but also whatever the evidence proves he will be likely to suffer thereafter from the same cause. Among the torts coming within this rule are personal injuries caused by the wrongful acts or negligence of others. The injury continuing beyond the time of trial, the future as well as the past is to be considered, since no other action can be maintained. So in cases of contract the performance of which is to extend through a period of time which has not elapsed when the breach is made and the action brought therefor and the trial had. Remelu *v.* Hall, 31 Vt. 582. Among these are actions on bonds or unsealed contracts stipulating for the support of persons during their natural life. Sibley *v.* Rider, 54 Maine, 463. Philbrook *v.* Burgess, 52 Maine, 271.

The contract in controversy falls within the same rule.

Although, as practically construed by the parties, the salary was payable weekly, still, when the plaintiff was peremptorily discharged from all further service during the remainder of the season, such discharge conferred upon him the right to treat the contract as entirely at an end, and to bring his action to recover damages for the breach. In such action he is entitled to a just recompense for the actual injury sustained by the illegal discharge. *Prima facie*, such recompense would be the stipulated wages for the remaining eighteen weeks. This, however, would not necessarily be the sum which he would be entitled to; for, in cases of contract as well as of tort, it is generally incumbent upon an injured party to do whatever he reasonably can, and to improve all reasonable and proper opportunities to lessen the injury. Miller *v.* Mariners' Church, 7 Maine, 51, 56; Jones *v.* Jones, 4 Md. 609; 2 Greenl. Ev. § 261, and notes; Chamberlin *v.* Morgan, 68 Pa. St. 168; Sedg. on Dam. (6th ed.) 416, 417, cases *supra*. The plaintiff could not be justified in lying idle after the breach; but he was bound to use ordinary diligence in securing employment elsewhere, during the remainder of the term; and whatever sum he actually earned or might have earned by the use of reasonable diligence, should be deducted from the amount of the unpaid stipulated wages. And this balance, with interest thereon, should be the amount of the verdict. Applying the rule mentioned, the verdict will be found too large.

By the plaintiff's own testimony, he received only $60, from all sources after his discharge,—$25 in February and $35 from the 10th to the 20th of April, at Booth's. His last engagement was for eight weeks, commencing April 10, which he abandoned on the 20th, thus voluntarily omitting an opportunity to earn $57, prior to the expiration of his engagement with the defendants, when the law required him to improve such an opportunity, if reasonable and proper. We think he should have continued the last engagement until May 6, instead of abandoning it and urging a trial in April, especially inasmuch as he could have obtained a trial in May,

just as well. The instructions taken together were as favorable to the defendants as they were entitled to.

If, therefore, the plaintiff will remit $57, he may have judgment for the balance of the verdict; otherwise the entry must be verdict set aside and new trial granted.

PLUMMER v. PENOBSCOT LUMBERING ASSOCIATION.

Maine, 1877. 67 Me. 363.

Case, in substance, that the plaintiff was possessed of about 700 M. feet of logs in the Penobscot River, fastened to posts and trees; that the river is a public highway; that the defendants on or about July 10, 1873, carelessly and unlawfully obstructed the channel in violation of their charter, at a point just below where the plaintiff's logs were fastened; that the boom remained one month, during which time the plaintiff was prevented from running his logs down; that during the time the market value depreciated; that this detention was to prevent the West Branch logs from coming down the river and perhaps going to sea; but that without this detention, the West Branch logs would have passed safely by and the plaintiff been uninjured; that when the boom was open, the plaintiff's rafts were torn from their fastening and scattered and carried down river, whereby the plaintiff was put to great expense and damage, 1st in looking after his logs, 2nd, in the depreciation of the value while the boom was closed, and 3d, for logs carried away.

The defendants relied upon their charter and alleged want of care on the part of the plaintiff.[1]

The presiding justice instructed the jury that the plaintiff was not required to exercise any care of the logs unless he had notice that they were in danger.

Dickerson, J. The plaintiff was not bound to take notice

[1] Part of the case is omitted.

of the declared purpose of the company to swing a boom across the river. Such declaration imposed no additional duty upon him. *Non constat* that the wrongful act threatened would be committed. It is sufficient for him if he exercised ordinary care in the preservation of his logs after he had knowledge that the wrong was done. The defendants were not in a situation to require of the plaintiff a greater degree of care, nor was he bound to render it. The instructions upon this branch of the case, and also in regard to the measure of damages, are unobjectionable.

Exceptions overruled.

BRANT *v.* GALLUP.

Illinois, 1885. 111 Ill. 487.

This was an action on the case, brought on the 6th day of October, 1876, by Daniel R. Brant, against Benjamin E. Gallup and Francis B. Peabody. The declaration substantially avers that Gallup & Peabody were loan agents, and on April 1, 1869, negotiated a loan from one Bourne, to Brant, of $45,000, payable in five years, and for security to Bourne took Brant's mortgage on certain property and the Dearborn theatre, in Chicago; that Brant, in consideration of taking the loan and executing the mortgage, and $2500 commissions paid to Gallup & Peabody, employed them, and they agreed with him, to procure to be insured, and to keep insured during the life of the mortgage, the said theatre building, against loss or damage by fire, in good and responsible insurance companies, to the amount of its fair insurable value, — the plaintiff, on notification and request, to pay the premiums; that the fair insurable value of the theatre was $150,000; that the defendants failed and neglected to perform their duties in the above-named respects, and that during the life of the mortgage, and on October 9, 1871, the Dearborn theatre was destroyed by fire, and by reason of the premises the plaintiff lost the fair insurable value of the building.

There were three trials in the case, the first resulting in a verdict for plaintiff for $73,666.66, the second and third in verdicts for the defendants. The judgment on the last verdict was, on error, affirmed by the Appellate Court for the First District, and the plaintiff appealed to this court. A motion was made to dismiss the appeal for want of jurisdiction of this court to hear the appeal.

WALKER, J.[1] It is claimed that the tenth instruction is vicious, and it was error to give it. It in substance informed the jury that if they believed, from the evidence, that appellant had been informed a sufficient time before the fire that the theatre was inadequately insured, then it was his duty to have effected additional insurance, if he deemed it necessary, and, failing to do so, he could not recover. This involves the question whether, in case of a breach of a contract for indemnity, the person indemnified, knowing of the breach of the agreement, may lie by and permit the loss to occur without a demand of performance of agreement, or to take other steps to secure himself from the loss, by performing the acts undertaken to be performed by the other party, or to procure other indemnity. The substance of this instruction is, that the party indemnified shall take such steps. It has been repeatedly held that a party being damaged cannot stand by and suffer the injury to continue and increase, without reasonable effort to prevent further loss. Justice and the principles of fairness require that every one shall use all reasonable efforts to preserve his property and protect his interests, even against the wrong or negligence of another. It is said it is not only the moral but the legal duty of a party who seeks to recover for another's wrong, to use due diligence in preventing loss thereby. This principle applies to a breach of contract, and a party is not entitled to compensation for injurious consequences from such breach, so far as he had the information, time, and opportunity necessary to prevent them. (See Sedgwick on Damages, 6th ed, p. 106, both text and note, and authorities cited.) The same princi-

[1] Part of the opinion is omitted.

ple has been recognized by this court in cases of trespass. If the doctrine is correct (and we perceive no reason, on principle or authority, to doubt it), then it was the duty of appellant to have procured insurance. Gallup & Peabody, so far as is disclosed by the record, never, after the mortgage was executed, procured a dollar of insurance on the buildings. It is, however, claimed, that they directed the insurance agents to issue policies, and when called on by the agents, appellant paid the premiums. If this is true, appellant was fully informed of the extent they had ordered insurance for him, and as he made no objection to the amount, he must have been satisfied. Had he not been, he surely would have seen them, and ordered more, and as he did not, he accepted what they did as a performance of their part of the contract. Knowing the amount they had ordered, if not satisfactory, and the contract was broken by a failure to order more, it was the duty of appellant to procure such an amount as he regarded necessary, and, failing to do so, under the authorities referred to he could not recover. This instruction, therefore, was not erroneous, and no error was committed in giving it.

Judgment affirmed.

SALLADAY *v.* DODGEVILLE.

Wisconsin, 1893. 85 Wis. 318.

Action by Ella M. Salladay against the town of Dodgeville to recover damages for personal injuries caused by a defective highway. The defendant requested the court to charge that if they found from the evidence "that the injuries, sufferings, or disability of the plaintiff were increased or rendered permanent by any want of such ordinary care on her part, or by reason of her becoming pregnant after the accident, and such pregnancy prevented proper medical treatment of her injuries, and such want of treatment resulted in increased prolongation or permanency of her injuries, sufferings, or disability, which would not other-

wise have resulted, she cannot recover from the defendant for any increased prolongation or permanency of her injuries, suffering, or disability, resulting from such want of care, if you find there was such want of care, or from such pregnancy, if you find there was such pregnancy." This latter instruction the court refused.

PINNEY, J.[1] The instructions of the court in respect to the effect of the after-pregnancy of the plaintiff upon the question of damages, we think were correct. If the plaintiff had rendered the consequences of the wrongful act of the defendant more severe or injurious to herself by some voluntary act which it was her duty to refrain from, or if by her neglect to exert herself reasonably to limit the injury and prevent the damages, in the cases in which the law imposes that duty, and thereby she suffered additional injury from the defendant's act, evidence is admissible in mitigation of damages to ascertain to what extent the damages claimed are to be attributed to such acts or omissions of the plaintiff. It is a question of negligence, and the measure of duty is ordinary care and diligence in the adoption of such measures of care or prevention as the case required and were within her knowledge or power. 1 Suth. Dam. § 155, *ut supra*. It does not appear that her medical adviser gave her any caution to avoid sexual intercourse, or even pregnancy, nor is there any evidence to show that she knew or understood that the nature of her injury was such that it was not prudent that she should do so. The mere fact that eight weeks after the injury pregnancy occurred, and when no caution in that respect appears to have been given by her medical adviser, is not necessarily and as a matter of law sufficient ground to justify a reduction of damages for the injury caused by the defendant's negligence, although the results of the injury may have been thereby prolonged, or her recovery delayed. The instructions given were correct in view of the testimony, and the one asked by the defendant was properly refused. The doing of any act which prevented or retarded her

[1] Part of the opinion is omitted.

recovery is not of itself a ground for reduction of damages. To have that effect it must have been a negligent act, and whether an act is or is not negligent is a question for the jury, and not of law for the court, if different minds may properly draw different inferences, even from the same established facts. The instructions asked entirely ignored this material consideration, whether the plaintiff was negligent or at fault for what occurred after her injury.

CLARK *v.* MARSIGLIA.

New York, 1845. 1 Denio, 317.

Error from the New York common pleas. Marsiglia sued Clark in the court below in assumpsit, for work, labor, and materials, in cleaning, repairing, and improving sundry paintings belonging to the defendant. The defendant pleaded *non assumpsit.*

The plaintiff proved that a number of paintings were delivered to him by the defendant to clean and repair, at certain prices for each. They were delivered upon two occasions. As to the first parcel, for the repairing of which the price was seventy-five dollars, no defence was offered. In respect to the other, for which the plaintiff charged one hundred and fifty-six dollars, the defendant gave evidence tending to show that after the plaintiff had commenced work upon them, he desired him not to go on, as he had concluded not to have the work done. The plaintiff, notwithstanding, finished the cleaning and repairing of the pictures, and claimed to recover for doing the whole, and for the materials furnished, insisting that the defendant had no right to countermand the order which he had given. The defendant's counsel requested the court to charge that he had the right to countermand his instructions for the work, and that the plaintiff could not recover for any work done after such countermand.

The court declined to charge as requested, but, on the

contrary, instructed the jury that inasmuch as the plaintiff had commenced the work before the order was revoked, he had a right to finish it, and to recover the whole value of his labor and for the materials furnished. The jury found their verdict accordingly, and the defendant's counsel excepted. Judgment was rendered upon the verdict.

Per Curiam. The question does not arise as to the right of the defendant below to take away these pictures, upon which the plaintiff had performed some labor, without payment for what he had done, and his damages for the violation of the contract, and upon that point we express no opinion. The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract: but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.

To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully

recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer. The judgment must be reversed, and a *venire de novo* awarded.

Judgment reversed.

KADISH *v.* YOUNG.

Illinois, 1883. 108 Ill. 170.

Scholfield, J.[1] This was assumpsit, by appellees, against appellants, to recover damages sustained by the breach of an alleged contract, whereby, on the 15th of December, 1880, appellees sold to appellants 100,000 bushels of No. 2 barley, at one dollar and twenty cents per bushel, to be delivered to appellants, and paid for by them, at such time during the month of January, 1881, as appellees should elect. Appellees tendered to appellants warehouse receipts for 100,000 bushels of No. 2 barley on the 12th of January, 1881, but appellants refused to receive the receipts and pay for the barley. Within a reasonable time thereafter appellees sold the barley upon the market, and having credited appellants with the proceeds thereof, they brought this suit, and on the trial in the circuit court they recovered the difference between the contract price and the value of the barley in the market on the day it was to have been delivered by the terms of the contract. Upon the trial appellants denied the making of the alleged contract, that they were partners, or that any purchase of the barley was made for their joint account; and they also contended, if a contract was shown, then that on the next day after it was made they gave notice to appellees that they did not consider themselves bound by the contract, and they would not comply with its terms, and evidence was given tending to sustain this contention. . . .

[1] Part of the opinion is omitted.

The questions of law to which our attention has been directed by the arguments of counsel, arise upon the rulings of the circuit judge in giving and refusing instructions. He thus ruled, among other things, that appellants, by giving notice to appellees on the next day after the making of the contract that they would not receive the barley and comply with the terms of the contract, did not create a breach of such contract which appellees were bound to regard, or impose upon them the legal obligation to resell the barley on the market, or make a forward contract for the purchase of other barley of like amount and time of delivery, within a reasonable time thereafter, and credit appellants with the amount of such sale, or give them the benefit of such forward contract, but that appellees had the legal right, notwithstanding such notice, to wait until the day for the delivery of the barley by the terms of the contract, and then, upon appellants' failure to receive and pay for it on its being tendered, to resell it on the market, and recover from appellants the difference between the contract price of the barley and its market value on the day it was to have been delivered.

That in ordinary cases of contract of sale of personal property for future delivery, and failure to receive and pay for it at the stipulated time, the measure of damages is the difference between the contract price and the market or current value of the property at the time and place of delivery, has been settled by previous decisions of this court (see McNaught v. Dodson, 49 Ill. 446, Larrabee v. Badger, 45 Id. 440, and Saladin v. Mitchell, Id. 79), and is not contested by appellants' counsel. But their contention is, that in case of such contract of sale for future delivery, where, before the time of delivery, the buyer gives the seller notice that he will not receive the property and comply with the terms of the contract, this, whether the seller assents thereto or not, creates a breach of the contract, or, at all events, imposes the legal duty on the seller to thereafter take such steps with reference to the subject of the contract, as, by at once reselling the property on the market on account of the buyer, or

making a forward contract for the purchase of other property of like amount and time of delivery, shall most effectually mitigate the damages to be paid by the buyer in consequence of the breach, without imposing loss upon the seller. If the buyer may thus create a breach of the contract without the consent of the seller, we doubt not the duty to sell (where the property is in the possession of the seller at the time), at least within a reasonable time after such breach, will result as a necessary consequence of the breach. When the breach occurs by a failure to accept and pay for property tendered pursuant to the terms of a contract, at the day specified for its delivery, this is doubtless the duty of the seller, and no reason is now perceived why it should not equally result from any breach of the contract upon which the seller is legally bound to act.

But the well settled doctrine of the English courts is, that a buyer cannot thus create a breach of contract upon which the seller is bound to act. . . .

Nothing would seem to be plainer than that while the contract is still subsisting and unbroken, the parties can only be compelled to do that which its terms require. This contract imposed no duty upon appellees to make other contracts for January delivery, or to sell barley in December, to protect appellants from loss. It did not even contemplate that appellees should have the barley ready for delivery until such time in January as they should elect. If appellees had then the barley on hand, and had acted upon appellants' notice, and accepted and treated the contract as then broken, it would, doubtless, then have been their duty to have resold the barley upon the market, precisely as they did in January, and have given appellants credit for the proceeds of the sale; but it is obviously absurd to assume that it could have been appellees' duty to have sold barley in December to other parties which it was their duty to deliver to appellants, and which appellants had a legal right to accept in January.

We have been referred to Dillon *v.* Anderson, 43 N. Y. 232, Danforth *et al. v.* Walker, 37 Vt. 240 (and same case again

in 40 Vt. 357), and Collins *v.* De Laporte, 115 Mass. 159, as recognizing the right of either party to a contract to create a breach of it obligatory upon the other party, by giving notice, in advance of the time for the commencement of the performance of the contract, that he will not comply with its terms. An examination of the cases will disclose that they do not go so far, but that they are entirely in harmony with what we have heretofore indicated is our opinion in respect of the law applicable to the present question.

In Dillon *v.* Anderson, the action was for a breach of contract for the construction of a pair of boilers for a steamboat. After work had been commenced under the contract, and a certain amount of material had been purchased therefor by the plaintiff, notice was given by the defendant to stop work, that the contract was rescinded by the defendant, and that he would make the plaintiff whole for any loss he might suffer. The court held that it was the duty of the plaintiff, as soon as he received the notice, to have so acted as to save the defendant from further damage, so far as it was in his power.

In Danforth *et al v.* Walker, 37 & 40 Vt., the defendant made a contract with the plaintiffs to purchase of them five car loads of potatoes, being fifteen hundred bushels, to be delivered at a designated place as soon as the defendant should call for them, and as soon as he could get them away, some time during the winter. Soon after the first car load was taken, potatoes fell in the market, and the defendant thereupon wrote the plaintiffs not to purchase any more potatoes until they should hear from him. The court held, this created a breach of the contract, and that plaintiffs were not authorized to purchase any more potatoes on account of the defendant after they received the notice. The court, in the case in 37 Vt., on page 244, use this language: "While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract.

The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such increased damages of the other party." And this same rule, upon the authority of these cases, is laid down in 2 Sutherland on Damages, 361.

The points in issue in Collins *v.* De Laporte are not pertinent to the present question, but in the opinion the court quotes the rule as above laid down, upon the authority of Danforth *et al. v.* Walker, and other cases.

It will be observed that in each of these cases the time for the performance of the contract had arrived, and its performance had been entered upon. In neither of them was the defendant at liberty, after notifying the plaintiff not to proceed further in the performance of the contract, to demand that he should proceed to perform it. . . .

It follows that, in our opinion, the ruling on the point in question was free of substantial objection.

Judgment affirmed.

LE BLANCHE *v.* LONDON AND NORTH WESTERN RAILWAY.

Court of Appeal, 1876. 1 C. P. Div. 286.

MELLISH, L.J.[1] This was an appeal from a judgment of the Common Pleas Division, affirming a judgment of the county court judge sitting at Bloomsbury, special leave having been given to appeal to us. The action in the county court was brought by the plaintiff, Mr. Le Blanche, against the London and North Western Railway Company, to recover £11 10*s*., the cost of a special train which the plaintiff engaged to carry him from York to Scarborough, on account of his having arrived too late at York for the train which leaves York at 6.5 for Scarborough, through, as he alleged, the

[1] Part of this opinion is omitted. CLEASBY, B., JAMES, L.J., BAGGALLAY, J.A., and MELLOR, J., delivered concurring opinions.

neglect of the defendants in not properly performing their contract with him to convey him from Liverpool to Scarborough. It was held by the judge of the county court that the plaintiff was entitled to recover the cost of the special train. . . .

I agree that, as a general rule, what is said by Alderson, B., in Hamlin *v.* Great Northern Ry. Co., 1 H. & N. 408, 26 L. J. (N.S.) (Ex. Ch.) 20, at p. 22, is correct, namely: "The principle is, that if the party does not perform his contract the other may do so for him as near as may be, and charge him for the expense incurred in so doing." I agree also with what is said by the judges of the Common Pleas Division, that this rule is not an absolute one applicable to all cases, and that the question must always be whether what was done was a reasonable thing to do having regard to all the circumstances. This, however, is a very vague rule, and it is desirable to consider whether any more definite rule can be laid down. Now, one mode of determining what, under the circumstances, was reasonable, is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company. The rule that what is reasonable under particular circumstances may be discovered by considering what a prudent person, uninsured, would do under the same circumstances, is applicable to many cases besides those which arise under policies of marine insurance.

I think that any expenditure which, according to the ordinary habits of society, a person who is delayed in his journey would naturally incur at his own cost, if he had no company to look to, he ought to be allowed to incur at the cost of the company, if he has been delayed through a breach of contract on the part of the company, but that it is unreasonable to allow a passenger to put the company to an expense to which he could not think of putting himself if he had no company to look to. The question, then, in my opinion, which the county court judge ought to have considered is,

whether, according to the ordinary habits of society, a gentleman in the position of the plaintiff, who was going to Scarborough for the purpose of amusement, and who missed his train at York, would take a special train from York to Scarborough at his own cost, in order that he might arrive at Scarborough an hour or an hour and a half sooner than he would do if he waited at York for the next ordinary train. This question seems to me to admit of but one answer, namely, that no one but a very exceptionally extravagant person would think of taking a special train under such circumstances. I am of opinion, therefore, that the county court judge did not act on the proper principle in considering the question of damage; and that unless the parties consent to the damages being reduced to 1*s.*, there ought to be an order for a new trial.

I think each party should pay his own costs of the appeal to the Common Pleas Division, and of the appeal to us.

CHAPTER VII.

COUNSEL FEES.

LINSLEY *v.* BUSHNELL.

Connecticut, 1842. 15 Conn. 225.

This was an action on the case for personal injury.[1]

Church, J. An objection is made to the charge of the judge in relation to the principle which might have influence in the assessment of damages. And cases from Massachusetts and New York, are relied upon in support of this objection. Whatever may have been formerly, or may be now the practice of the courts of other States upon this subject, we are certain our own practice has been uniformly and immemorially such as the judge recognized in his charge in this case. *Nolumus leges mutare.* We have no disposition to discard our own usages in this respect. We believe them to be founded in the highest equity, and sanctioned by the clearest principles. The judge informed the jury, that in estimating the damages, they had a right to take into consideration the necessary trouble and expenses of the plaintiff, in the prosecution of this action.

In actions of this character, there is no rule of damages fixed by law, as in cases of contract, trover, &c. The object is the satisfaction and remuneration for a personal injury, which is not capable of an exact cash valuation. The circumstances of aggravation or mitigation, — the bodily pain, — the mental anguish, — the injury to the plaintiff's business and means of livelihood, past or prospective; — all

[1] The statement of facts and part of the opinion are omitted.

these and many other circumstances may be taken into consideration, by the jury, in guiding their discretion in assessing damages for a wanton personal injury. But these are not all, that go to make up the amount of damage sustained. The bill of the surgeon, and other pecuniary charges to which the plaintiff has been necessarily subjected, by the misconduct of the defendant, are equally proper subjects of consideration. And shall a defendant, who has refused redress for an unprovoked and severe personal injury, and thus driven the plaintiff to seek redress in the courts of law, be permitted to say, that the trouble and expense of the remedy was unnecessary, and was not the necessary result of his own acts, connected with his refusal to do justice?

There is no principle better established, and no practice more universal, than that vindictive damages, or smart money, may be, and is, awarded, by the verdicts of juries, in cases of wanton or malicious injuries, and whether the form of the action be trespass or case. We refer to the authorities before cited, and also to Denison *v.* Hyde, 6 Conn. Rep. 508; Woert *v.* Jenkins, 14 Johns. Rep. 352; Merills *v.* Tariff Manufacturing Company, 10 Conn. Rep. 384; Edwards *v.* Beach, 3 Day, 447. In this last case, Daggett, in argument for the defendant, admits, that where an important right is in question, in an action of trespass, "the court have given damages to indemnify the party for the expense of establishing it." The argument in opposition to the doctrine of the charge, is substantially founded upon the assumed principle, that the defendant cannot be subjected in a greater sum in damages than the plaintiff has actually sustained. But every case in which the recovery of vindictive damages has been justified, stands opposed to this argument. And we cannot comprehend the force of the reasoning, which will admit the right of a plaintiff to recover, as vindictive damages, beyond the amount of injury confessedly incurred, and in case of an act and injury equally wanton and wilfully committed or permitted, will deny to him a right to recover an actual indemnity for the expense to which the defendant's misconduct has sub-

jected him. In the cases to which we have been referred, in other States, as deciding a different principle, the courts seem to have assumed, that the taxable costs of the plaintiff are his only legitimate compensation for the expense incurred. If taxable costs are presumed to be equivalent to actual, necessary charges, as a *matter of law;* every client knows, as a *matter of fact*, they are not. And legal fictions should never be permitted to work injustice. This court has repudiated this notion. It was formerly holden in England, and perhaps is so considered now, that no action would lie for the injury sustained by the prosecution of a vexatious civil action, when there has been no arrest or imprisonment; because the costs recovered, compensated for that injury. But this court, in the case of Whipple *v.* Fuller, 11 Conn. Rep. 582, hold a contrary doctrine, and say, "we cannot, at this day, shut our eyes to the fact known by everybody, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit."

DAY *v.* WOODWORTH.

United States Supreme Court, 1851. 13 How. 363.

GRIER, J.[1] The court instructed the jury "that if they should find for the plaintiff on the first ground, viz., that the defendants had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then the jury would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, but not anything for counsel fees or extra compensation to engineers."

This instruction of the court is excepted to, on two grounds. First, because "this being an action of trespass, the plaintiff was not limited to actual damages proved," and secondly, that the jury, under the conditions stated in the

[1] Part of the opinion is omitted.

charge, should have been instructed to include in their verdict for the plaintiff, not only the actual damages suffered, but his counsel fees and other expenses incurred in prosecuting his suit.

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prose-

cuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.

This doctrine about the right of the jury to include in their verdict, in certain cases, a sum sufficient to indemnify the plaintiff for counsel fees and other real or supposed expenses over and above taxed costs, seems to have been borrowed from the civil law and the practice of the courts of admiralty. At first, by the common law, no costs were awarded to either party, *eo nomine*. If the plaintiff failed to recover he was amerced *pro falso clamore*. If he recovered judgment, the defendant was *in misericordia* for his unjust detention of the plaintiff's debt, and was not therefore punished with the *expensa litis* under that title. But this being considered a great hardship, the statute of Gloucester (6 Edw. 1, c. 1) was passed, which gave costs in all cases when the plaintiff recovered damages. This was the origin of costs *de incremento*; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause. See Bac. Abr. tit. Costs.

Under the provisions of this statute every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit. It is true, no doubt, and is especially so in this country (where the legislatures of the different States have so much reduced attorneys' fee-bills, and refused to allow the *honorarium* paid to counsel to be exacted from the losing party), that the legal taxed costs are far below the real expenses incurred by the litigant; yet it is all the law allows as *expensa litis*. If the jury may, "if they see fit," allow counsel fees and expenses as a part of the actual damages incurred by the plaintiff, and then the court add legal costs *de incremento*, the defendants may be truly said to be *in misericordia*, being at the mercy both of court

and jury. Neither the common law, nor the statute law of any State, so far as we are informed, has invested the jury with this power or privilege. It has been sometimes exercised by the permission of courts, but its results have not been such as to recommend it for general adoption either by courts or legislatures.

The only instance where this power of increasing the "actual damages" is given by statute is in the patent laws of the United States. But there it is given to the court and not to the jury. The jury must find the "actual damages" incurred by the plaintiff at the time his suit was brought; and if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessary expense and trouble to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it. But this penalty cannot, and ought not, to be twice inflicted; first, at the discretion of the jury, and again at the discretion of the court. The expenses of the defendant over and above taxed costs are usually as great as those of plaintiff; and yet neither court nor jury can compensate him, if the verdict and judgment be in his favor, or amerce the plaintiff *pro falso clamore* beyond tax costs. Where such a rule of law exists allowing the jury to find costs *de incremento* in the shape of counsel fees, or that equally indefinite and unknown quantity denominated (in the plaintiff's prayer for instruction) "&c.," they should be permitted to do the same for the defendant where he succeeds in his defence, otherwise the parties are not suffered to contend in an equal field. Besides, in actions of debt, covenant, and assumpsit, where the plaintiff always recovers his actual damages, he can recover but legal costs as compensation for his expenditure in the suit, and as punishment of defendant for his unjust detention of the debt; and it is a moral offence of no higher order, to refuse to pay the price of a patent or the damages for a trespass, which is not wilful or malicious, than to refuse the payment of a just debt. There is no reason, therefore, why the law should give the plaintiff such

an advantage over the defendant in one case, and refuse it in the other. See Barnard v. Poor, 21 Pickering, 382; and Lincoln v. the Saratoga Railroad, 29 Wendell, 435.

We are of opinion, therefore, that the instruction given by the court in answer to the prayer of the plaintiff, was correct.

POND v. HARRIS.

Massachusetts, 1873. 113 Mass. 114.

Contract to recover damages for the revocation by the defendant of an agreement to submit the controversies between the parties to arbitration.[1]

Devens, J. It is argued that, as it is found by the auditor's report and by the jury that there was nothing due upon these claims, the plaintiff is entitled to no damages, or at most to but nominal damages, on account of the revocation, and that it must be deemed that the arbitrators would have come to the result at which the jury have arrived. But the injury that he has sustained by the wrongful act of the defendant is that he has been deprived of his right to submit the claims to the tribunal which the parties had agreed upon. The expenses to which he has been subjected by reason of his necessary preparation for a trial before the arbitrators, on account of his own loss of time and trouble, and in employing counsel, taking depositions, payments to witnesses, arbitrators, and expenditures of a similar nature, are proper matters of claim. He is entitled to recover these so far only as he has lost the benefit of them by the act of the defendant. So far as these preparations and expenditures were available for the trial of his cause before the ordinary legal tribunals to which the revocation of the defendant compelled him to resort, he is not entitled to recover, as he has had or might have had the benefit of them. Ordinarily, it is true, as the defendant argues, counsel fees are not recoverable; but if the

[1] The statement of facts and part of the opinion are omitted.

plaintiff has been deprived, by the wrongful act of the defendant, of the benefit of those services of counsel for which he had incurred expense, upon the former agreement for arbitration, inasmuch as they were expenditures he might properly incur, so far as they were suitable, there is no reason why he should not recover them in this action. The principles suggested as those upon which his damages are to be computed, have been decided to be the proper ones in several cases.

In Hawley *v.* Hodge, 7 Vt. 237, the plaintiff had travelled four hundred miles to attend a session of the arbitrators; had employed and paid counsel, and had paid the arbitrator; and it was held, in an action by him for damages, that where a party revokes a submission, he must pay all damages occasioned thereby, including the cost and expenses which the party had been subjected to in preparing for trial, to which he would not have been subjected but for the submission, and which he could not recover in any other way. See also Rowley *v.* Young, 3 Day, 118; Blaisdell *v.* Blaisdell, 14 N. H. 78.

For the trouble and expense which the plaintiff had been at in making the contract, he would not, however, be entitled to recover; his damages must be only for the breach of the contract. *Judgment for the plaintiff.*

RYERSON *v.* CHAPMAN.

Maine, 1877. 66 Me. 557.

Peters, J.[1] The evidence in this case is meagre. Aided by the briefs of counsel, we understand the facts, among other things, to show as follows: The defendant, getting a supposed title to a parcel of land by levy, conveyed the land to the plaintiff by a warrantee deed. The plaintiff had been in an undisturbed occupation of the land under his deed for about fifteen years, when his possession was invaded by one Carle-

[1] Part of the opinion is omitted.

ton, who claimed title to the land upon the ground that the levy under which the defendant acquired the land, was defective and void. The plaintiff sued Carleton, and Carleton sued the plaintiff, in actions of trespass, and several other suits followed between them. While all the suits were pending, one of them was carried up to decide the question of title to the land, and Carleton prevailed, as will be seen in Carleton *v.* Ryerson, 59 Maine, 438. After this, the defendant paid to the plaintiff all the costs and counsel fees incurred in the defence of that action, and also paid him the value of the land from which he was evicted, but refuses to pay the damages, costs, and expenses incurred in the other actions. Several actions were brought against the plaintiff, and there were two in his favor. Several questions of law and fact are referred to us and we have, by agreement, jury powers to aid us in deciding them. . . .

The principal question of law in the case is, whether the plaintiff is entitled to recover, under the warranty of title, any more of the costs and expenses of litigation paid by him than what grew out of a single suit. The defendant maintains that he cannot recover more, upon the supposition that one litigation was sufficient to settle the question of title. It is our judgment that the plaintiff can recover more than the expenses of litigating one suit. . . .

The covenant of warranty amounts to an agreement of indemnity. The foundation of a claim for damages under it, must be that an eviction, or something equivalent thereto, has properly taken place. The covenantee, who has been evicted, is entitled to have repaid to him all reasonable outlay which he in good faith expends for the assertion or defence of the title warranted to him. Weston, C.J., says (Swett *v.* Patrick, 12 Maine, 9, 10): "He (covenantee) was justified in making every fair effort to retain the land." If he is assaulted with ever so many suits, he must defend them, unless it is clear that a defence would avail nothing. If he defends but one, and lets the others go by default, he might get himself into inextricable trouble. It is as essential that he should defend

all the suits as any one of them. A defender of a walled city might as well plant all his means of defence at a single gate, and leave all the others undefended, to be entered by the enemy.

The covenantee becomes the agent of the covenantor, in making a defence against suits. He should do for his warrantor what the warrantor should do for himself, if in possession. It is no more expensive for the warrantor to defend suits brought against his agent, than suits against himself, and the presumption is, that he would have been a party to the same litigations, had he remained in possession. But the agent must act cautiously and reasonably. He has no right to "inflame his own account" (11 A. & E. 28), nor indulge in merely quarrelsome cases.

It follows, therefore, that the plaintiff may recover for the damages and costs and expenses of suits brought against him, and also for the costs and expenses of suits brought by him, affecting the title to the estate. Each suit may have been a part of the means by which the title was sought to be defended. The case in 108 Mass. 270 (Merritt *v.* Morse), cited by the plaintiff, seems quite identical with this case. We have carefully considered the able argument of the counsel for the defendant, but cannot concur in it. The cases cited by him upon this point, do not go far enough to sustain his position. The language used in them is appropriate enough to the idea of one suit only being necessary to settle a question of title, but in such cases the damages and costs of one suit only were involved. None of them decide, or undertake to decide, the question presented here.

The defendant contends that he is not liable for the costs and counsel fees in some of the actions, of the pendency of which he was not notified. But notice was not necessary to put upon him such a liability. Without a notice, the plaintiff can recover his damages caused by the failure of the title warranted to him. And, in this State, the costs of the former action and the expenses of counsel fees attending it, whether in asserting or defending the title, are a portion of the dam-

ages recoverable. The want of notice of a suit to the warrantor, undoubtedly increases the burden of proof that falls on the warrantee. In such case he would be held to prove that the actions brought against him were reasonably defended, and that the costs were fairly and necessarily incurred. And as to the costs in cases in which the warrantee was plaintiff instead of defendant, and also as respects counsel fees and expenses in cases where he was either plaintiff or defendant, and whether the covenantor was notified or not, from the nature of things, the burden is on the covenantee to show such items to be reasonable and proper claims, where the grantor does not appear in the suits. The case of Swett *v.* Patrick, 12 Maine, 9, does not decide that such items are not recoverable where no notice was given, but gives the fact of notice as an additional or conclusive reason why they should be included in the damages. We are aware that it is maintained in many cases that a judgment against a warrantee is *prima facie* evidence of both eviction and the infirmity of the title, even though the warrantor had no notice of the former litigation, in a suit by the warrantee against the warrantor upon the covenants in the deed. But we think the law has never been so regarded in this State. Such judgment "is legally admissible to prove the act of eviction, but not the superior title of the recovering party." Hardy *v.* Nelson, 27 Maine, 525, 530. If the grantor has notice of the former suit and an opportunity to defend, then, in the absence of fraud or collusion, the judgment in the former suit is conclusive against him. But we do not think it reasonable that a grantor should be required to prove that a judgment was wrongfully recovered against his grantee, when he had no notice to be heard. Veazie *v.* Penobscot Railroad, 49 Maine, 119; Thurston *v.* Spratt, 52 Maine, 202; Coolidge *v.* Brigham, 5 Met. 68; Chamberlain *v.* Preble, 11 Allen, 370; Rawle on Cov. 122 *et seq.*; Smith *v.* Compton, 3 B. & Ad. 407.

WESTFIELD *v.* MAYO.

Massachusetts, 1877. 122 Mass. 100.

Tort to recover the amount of a judgment paid by the plaintiff to Mary J. Hanchett for injuries sustained by her upon a highway which the plaintiff was bound to keep in repair; and also $150, the expenses of the suit in which that judgment was recovered.[1]

Lord, J. The remaining question in this case is, whether the plaintiff shall recover the amount paid as counsel fees in the suit against the town, which, it is agreed, are reasonable, if in law they are to be allowed. The defendant was notified by the town of the pendency of the original suit, and was requested to defend it, which he declined to do.

The difficulty is not in stating the rule of damages, but in determining whether in the particular case the damages claimed are within the rule. Natural and necessary consequences are subjects of damages; remote, uncertain and contingent consequences are not. Whether counsel fees are natural and necessary, or remote and contingent, in the particular case, we think may be determined upon satisfactory principles; and, as a general rule, when a party is called upon to defend a suit, founded upon a wrong, for which he is held responsible in law without misfeasance on his part, but because of the wrongful act of another, against whom he has a remedy over, counsel fees are the natural and reasonably necessary consequence of the wrongful act of the other, if he has notified the other to appear and defend the suit. When, however, the claim against him is upon his own contract, or for his own misfeasance, though he may have a remedy against another and the damages recoverable may be the same as the amount of the judgment recovered against himself, counsel

[1] The statement of facts and the opinion of Morton, J., on another point are omitted.

fees paid in defence of the suit against himself are not recoverable.

The decision in Reggio *v.* Braggiotti, 7 Cush. 166, is adverse to the allowance of counsel fees, as falling within the latter class. In that case the plaintiff sold to Henshaw, Ward & Co. an article with a warranty that it was known in commerce as opium; and Henshaw, Ward & Co. recovered damages against the plaintiff upon his warranty. They, having made the warranty, were responsible for damages resulting from the breach of their own contract. The defendant in that case had made a similar warranty to the plaintiffs, and although they were liable to him upon that warranty, it was held that they were not liable for counsel fees paid in defending their own warranty. Although the reasons for that decision, which are very briefly given, are not the same which we now assign in support of it, the decision itself is sustained by the authorities.

In Baxendale *v.* London, Chatham & Dover Railway, L. R. 10 Ex. 35, it appeared that one Harding had contracted with the plaintiff to convey certain valuable pictures from London to Paris. The plaintiff, by another contract, agreed with the defendant for the carriage by the defendant of the same pictures to the same destination. The pictures were damaged in the transportation. Harding brought his action against the plaintiff for damage to the pictures upon the contract between them and recovered. The plaintiff then brought his action against the defendant for breach of its contract with him; and the defendant denied its liability, but being held liable, the question arose whether counsel fees which the plaintiff had expended in defence of Harding's claim upon him should be added as damages to the amount recovered by Harding; and it was held that they could not be.

In Fisher *v.* Val de Travers Asphalte Co., 1 C. P. D. 511, the same result was reached. In that case the plaintiff made a contract with a tramway company to construct a tramway in a workmanlike manner with Val de Travers asphalte and concrete, and to keep the same in good order for twelve

months. The plaintiff also contracted with the defendant to construct for him the same tramway and with like warranty. The plaintiff, however, did not make the contract with the defendant to construct the tramway for himself, but he had agreed to construct it for the Metropolitan Tramway Company, which was the owner of the tramway. One Hicks sustained an injury by reason of the defective condition of the way, and commenced proceedings against the Metropolitan Tramway Company for damages, and the Metropolitan Tramway Company notified the plaintiff, and the plaintiff notified the defendant. The defendant declined to interfere. The plaintiff, however, took upon himself the defence of the suit against the tramway company, and adjusted it; and the settlement was found to be a reasonable and proper one. In his action against the defendant, he contended that his counsel fees incurred in the previous proceedings should be added to the amount paid to Hicks. Brett and Lindley, JJ., in their several opinions, felt themselves bound by the decision in Baxendale *v.* London, Chatham & Dover Railway, above cited, but thought that, if they were not precluded by that decision, they should have great difficulty in refusing to allow counsel fees in addition to the amount paid as damages; but Lord Coleridge, C.J., while holding that that decision was conclusive, was not prepared to say that it was not right in principle. And he uses this very suggestive language: "The tramway company contract with Fisher; Fisher contracts with the defendants, and the claim of Hicks arises from negligence of the latter. Are the defendants to be liable to three sets of costs, because the actions may have been reasonably defended? If they are, the consequences may be serious. If not, at which link of the chain are the costs to drop out?"

Following this suggestion, if, in the case of Reggio *v.* Braggiotti, there had been ten successive sales instead of two, and each with the same implied warranty, and successive suits had been brought by the ten successive purchasers, each against his warrantor, would the first seller be liable for such

accumulation of counsel fees upon his contract of warranty? If not, in the pertinent language just quoted, "at which link of the chain are the costs to drop out?" In each of these cases, it will be observed that the counsel fees were paid in defending a suit upon the party's own contract.

In the present case, the plaintiff was not compelled to incur the counsel fees by reason of any misfeasance, or of any contract of its own, but was made immediately liable by reason of the wrongdoing of the defendant. There seems therefore to be no ground, in principle, by which it should be precluded from recovering as a part of its damages the expenses reasonably and properly incurred in consequence of the wrongdoing of the defendant. Within this rule a master, who is immediately responsible for the wrongful acts of a servant, though there is no misfeasance on his part, might recover against such servant not only the amount of the judgment recovered against him, but his reasonable expenses including counsel fees, if notified to defend the suit. It may be said in that case, as in this, that there may be a technical misfeasance, or rather nonfeasance, in not guarding more carefully the conduct of the servant, or in [not] watching for obstructions in the street; but no negligence is necessary to be proved in either case as matter of fact; the party is directly liable because of the wrong of another, whatever diligence he may have himself exercised. It does not, however, apply to cases where one is defending his own wrong or his own contract, although another may be responsible to him.[1] . . .

If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit and may call upon him to defend it; if he fails to defend, then, if liable over, he is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defence. And this

[1] The learned judge then considered the case of Lowell v. Boston & Lowell Railroad, 23 Pick. 24.

rule, while consistent with legal principles, is sanctioned by the highest equitable considerations. If the party ultimately liable for his exclusive wrongdoing has notice that an intermediate party is sued for the wrong done by him, it is right, legally and equitably, that he take upon himself at once the defence of his own act, thereby settling the whole matter in a single suit; if he requires the intermediate party to defend, there is no rule of law or of morals which should relieve him from the consequences of his additional neglect of duty. Upon the whole, therefore, we are entirely satisfied that the exceptions must be overruled and judgment entered for the plaintiff for the larger sum, which includes what, it is agreed, are reasonable counsel fees.

Exceptions overruled.

CHAPTER VIII.

CERTAINTY.

RICE *v.* RICE.

Michigan, 1895. 62 N. W. Rep. 833.

PLAINTIFF recovered verdict and judgment against the defendant, her father-in-law, for the alienation of her husband's affections.

GRANT, J.[1] The defendant requested the court to instruct the jury that there was no testimony entitling the plaintiff to recover more than nominal damages, and that there were no facts upon which they could determine what, if any, loss she had sustained, either by assistance, loss of society, or support by her husband. This request, as a whole, was properly refused, because it left out entirely the damages resulting from mental anguish, mortification, and injured feelings. In those actions where damages may be awarded for these and for loss of society, the amount of damages lies in the sound discretion of the jury. They are not capable of accurate measurement, and it is not necessary to introduce any evidence of value. When the jury have before them the social standing and character of the parties, and the circumstances surrounding the wrong done, they have all that is proper and necessary upon which to find a verdict. Had the defendant requested the court to instruct the jury that there was no evidence upon which they could find a verdict for loss of support and maintenance, it would have been error to refuse it, because there was no evidence of the value of such support. The sole evidence was the fact that they lived together for six months in a house owned by defendant. The

[1] Part of the opinion is omitted.

court instructed them that she was entitled to recover for mental anguish and suffering, mortification, and embarrassment for the loss of her husband's society, and for the loss of his support and maintenance. It is true that the court said to them that "all these elements of damage, except the loss of support and maintenance, are such that it is not possible to figure them on any mathematical basis." But he did not instruct them that there was no basis afforded by the evidence upon which they could determine the damages resulting from loss of support and maintenance. The verdict ($3,000) was large, considering the condition of the parties, and we cannot say that the jury did not consider and allow for the loss of support. The judgment must be set aside, and a new trial ordered.[1]

GREENE *v.* GODDARD.

Massachusetts, 1845. 9 Met. 212.

Russell & Co., the plaintiffs, a firm of commission merchants in China, drew bills on Goddard's account upon Wiggin & Co., in London; Goddard agreeing that they should be paid at maturity. Wiggin & Co. failed before maturity of the bills; whereupon one Forbes, a member in Boston of the firm of Russell & Co., arranged with Baring Brothers & Co., their London correspondents, to take up the bills at maturity *supra protest*. Baring Brothers did so, holding as security goods consigned to them by Russell & Co. If they had not taken up these bills, they would at once upon receipt of the goods have advanced to Forbes, or to Russell & Co. in China, fifty or sixty per cent. of the value of the goods. Goddard eventually paid Baring Brothers the amount of the bills. Russell & Co. claim damages (*inter alia*) because of the withholding of advances by Baring Brothers.[2]

[1] See Leeds *v.* Metropolitan Gas-Light Co., *ante*, p. 53.

[2] This short statement of such facts as are necessary for the decision of the point here considered is substituted for the statement of the reporter. Part of the opinion is omitted.

HUBBARD, J. In regard to the claim for losses alleged by the plaintiffs to have been suffered by them in consequence of the withholding of advances by Baring Brothers & Co. on the goods consigned, they having retained them as a security for their reimbursement, we think the claim cannot be sustained. The plaintiffs are entitled to recover for the loss directly and necessarily incurred by them in providing for the payment of these bills; but they cannot claim compensation for the loss of those incidental benefits which they might have derived from the use of their money. Speculative damages (sometimes so called) are not favored in law; and the actual damage, arising out of breach of contract for the non-payment of money, is usually measured by the interest of money. In this case, the alleged damage is, that the plaintiffs could have availed themselves of the high rate of exchange, or of other advantages, if they had not been deprived of the use of the money which was detained from them, and, as they say, through the default of the defendant. But, viewing the facts in the most favorable light for the plaintiffs, their loss is but suppositive. In the use of the money, instead of realizing great profits, they might have encountered difficulties and sustained injuries unforeseen at the time, and have suffered, like thousands of others. Theirs is not a loss, in the just sense of the term, but the deprivation of an opportunity for making money, which might have proved beneficial, or might have been ruinous; and it is of that uncertain character, which is not to be weighed in the even balances of the law, nor to be ascertained by well established rules of computation among merchants. We are to bear in mind that the property held by the Barings consisted of goods consigned to them by the house in Canton, and that, by the usage between them, the consignees, on the receipt of the goods, and sometimes on receipt of the bills of lading and shipping documents, sent forward remittances to Russell & Co. at Canton, either in specie or bills on India, or in goods, when so directed, to the amount of 50 or 60 per cent on the value of the respective consignments. But no evidence is furnished by the plaintiffs, to show that such re-

mittances would have resulted in a profit to them, or that they suffered, in any way, by their being retained. Nor does it follow that the consignees would have felt authorized to answer the bills of Mr. Forbes, one of the members of the house, to divert the funds to America, without the approbation of the house itself. And judging from the correspondence, Mr. Forbes himself would have been equally unwilling to make use of those funds here, even should the Barings have consented to charge his drafts to that account; lest he might injure the standing of his house in India, by diverting money that would be payable to the owners of the goods in cases where the plaintiffs were merely consignees and not owners. To sustain such a claim as this would be to sanction principles not supported by any decisions with which we are acquainted, and instead of making persons sustain the direct loss arising from their neglect of engagements, it would be to expose them to hazards never contemplated, and to affect them by uncertain speculations in the profits of which they could have no participation, while at the same time they would be made insurers of such profits to their creditors. See Hayden *v.* Cabot, 17 Mass. 169. This ground of claim for damages, therefore, on the part of the plaintiffs, must be rejected.

GRIFFIN *v.* COLVER.

New York, 1858. 16 N. Y. 489.

Selden, J. The only point made by the appellants is, that in estimating their damages on account of the plaintiff's failure to furnish the engine by the time specified in the contract, they should have been allowed what the proof showed they might have earned by the use of such engine, together with their other machinery, during the time lost by the delay. This claim was objected to, and rejected upon the trial as coming within the rule which precludes the allowance of profits, by way of damages, for the breach of an executory contract.

To determine whether this rule was correctly applied by the referee, it is necessary to recur to the reason upon which it is founded. It is not a primary rule, but is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown, by clear and satisfactory evidence, to have been actually sustained. It is a well established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not.

Hence, in an action for the breach of a contract to transport goods, the difference between the price, at the point where the goods are and that to which they were to be transported, is taken as the measure of damages; and in an action against a vendor for not delivering the chattels sold, the vendee is allowed the market price upon the day fixed for the delivery. Although this, in both cases, amounts to an allowance of profits, yet, as those profits do not depend upon any contingency, their recovery is permitted. It is regarded as certain that the goods would have been worth the established market price, at the place and on the day when and where they should have been delivered.

On the other hand, in cases of illegal capture, or of the insurance of goods lost at sea, there can be no recovery for the probable loss of profits at the port of destination. The principal reason for the difference between these cases and that of the failure to transport goods upon land is, that in the latter case the time when the goods should have been delivered, and consequently that when the market price is to be taken, can be ascertained with reasonable certainty; while in the former the fluctuation of the markets and the contin-

gencies affecting the length of the voyage render every calculation of profits speculative and unsafe.

There is also an additional reason, viz., the difficulty of obtaining reliable evidence as to the state of the markets in foreign ports; that these are the true reasons is shown by the language of Mr. Justice Story, in the case of the Schooner Lively, 1 Gallis. 315, which was a case of illegal capture. He says: "Independent, however, of all authority, I am satisfied upon principle that an allowance of damages, upon the basis of a calculation of profits, is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness in point of time and value which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage and the season of the arrival; much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjectures and not upon facts."

Similar language is used in the cases of the Amiable Nancy, 3 Wheat. 546, and L'Amistad de Rues, 5 Wheat. 385. Indeed, it is clear that whenever profits are rejected as an item of damages, it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business, to constitute a safe criterion for an estimate of damages. This is to be inferred from the cases in our own courts. The decision in the case of Blanchard *v.* Ely, 21 Wend. 342, must have proceeded upon this ground, and can, as I apprehend, be supported upon no other. It is true that Judge Cowen, in giving his opinion, quotes from Pothier the following rule of the civil law, viz.: "In general, the parties are deemed to have contemplated only the damages and injury which the creditor might suffer from the non-performance of the obligations in respect to the particular thing which is the object of it, and

not such as may have been accidentally occasioned thereby in respect to his own (other) affairs." But this rule had no application to the case then before the court. It applies only to cases where, by reason of special circumstances having no necessary connection with the contract broken, damages are sustained which would not ordinarily or naturally flow from such breach: as where a party is prevented by the breach of one contract from availing himself of some other collateral and independent contract entered into with other parties, or from performing some act in relation to his own business not necessarily connected with the agreement. An instance of the latter kind is where a Canon of the church, by reason of the non-delivery of a horse pursuant to agreement, was prevented from arriving at his residence in time to collect his tithes.

In such cases the damages sustained are disallowed, not because they are uncertain, nor because they are merely consequential or remote, but because they cannot be fairly considered as having been within the contemplation of the parties at the time of entering into the contract. Hence the objection is removed, if it is shown that the contract was entered into for the express purpose of enabling the party to fulfil his collateral agreement, or perform the act supposed. (Sedg. on Dam., ch. 3.)

In Blanchard *v.* Ely the damages claimed consisted in the loss of the use of the very article which the plaintiff had agreed to construct; and were, therefore, in the plainest sense, the direct and proximate result of the breach alleged. Moreover, that use was contemplated by the parties in entering into the contract, and constituted the object for which the steamboat was built. It is clear, therefore, that the rule of Pothier had nothing to do with the case. Those damages must then have been disallowed, because they consisted of profits depending, not, as in the case of a contract to transport goods, upon a mere question of market value, but upon the fluctuations of travel and of trade, and many other contingencies. The citation by Judge Cowen, of the maritime

cases to which I have referred, tends to confirm this view. This case, therefore, is a direct authority in support of the doctrine that whenever the profits claimed depend upon contingencies of the character referred to, they are not recoverable.

The case of Masterton *v.* The Mayor, &c., of Brooklyn, 7 Hill, 61, decides nothing in opposition to this doctrine. It simply goes to support the other branch of the rule, viz., that profits are allowed where they do not depend upon the chances of trade, but upon the market value of goods, the price of labor, the cost of transportation, and other questions of the like nature, which can be rendered reasonably certain by evidence.

From these authorities and principles it is clear that the defendants were not entitled to measure their damages by estimating what they might have earned by the use of the engine and their other machinery had the contract been complied with. Nearly every element entering into such a computation would have been of that uncertain character which has uniformly prevented a recovery for speculative profits.

But it by no means follows that no allowance could be made to the defendants for the loss of the use of their machinery. It is an error to suppose that "the law does not aim at complete compensation for the injury sustained," but "seeks rather to divide than satisfy the loss." (Sedg. on Dam., ch. 3.) The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.

The familiar rules on the subject are all subordinate to these. For instance: That the damages must flow directly

and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last.

These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural, and even necessary result of the breach, and yet, if in their nature uncertain, they must be rejected; as in the case of Blanchard v. Ely, where the loss of the trips was the direct and necessary consequence of the plaintiff's failure to perform. So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach, but, for some special circumstances, collateral to the contract itself or foreign to its apparent object, they cannot be recovered; as in the case of the loss by the clergyman of his tithes by reason of the failure to deliver the horse.

Cases not unfrequently occur in which both these conditions are fulfilled: where it is certain that some loss has been sustained or damage incurred, and that such loss or damage is the direct, immediate and natural consequence of the breach of contract, but where the amount of the damages may be estimated in a variety of ways. In all such cases the law, in strict conformity to the principles already advanced, uniformly adopts that mode of estimating the damages which is most definite and certain. The case of Freeman v. Clute, 3 Barb. S. C. R., 424, is a case of this class, and affords an apt illustration of the rule. That case was identical in many of its features with the present. The contract there was to construct a steam engine to be used in the process of manufacturing oil, and damages were claimed for delay in furnishing it. It was insisted in that case, as in this, that the damages were to be estimated by ascertaining the amount of business which could have been done by the use of the engine, and the profits that would have thence accrued.

This claim was rejected by Mr. Justice Harris, before whom the cause was tried, upon the precise ground taken here. But he nevertheless held that compensation was to be allowed for the "loss of the use of the plaintiff's mill and other machinery." He did not, it is true, specify in terms the mode in which the value of such use was to be estimated; but as he had previously rejected the probable profits of the business as the measure of such value, no other appropriate data would seem to have remained but the fair rent or hire of the mill and machinery; and such I have no doubt was the meaning of the judge. Thus understood, the decision in that case, and the reasoning upon which it was based, were I think entirely accurate.

Had the defendants in the case of Blanchard *v.* Ely, *supra*, taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips, which had certainly occurred, was not only the direct but the immediate and necessary result of the breach of the plaintiffs' contract.

The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat, or the use of machinery, &c., &c., are not only susceptible of more exact and definite proof, but in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; just as the ordinary rate of interest is upon the whole a more accurate measure of the damages sustained in consequence of the non-payment of a debt than any speculative profit which the creditor might expect to realize from the use of the money. It is no answer to this to say that, in estimating what would be the fair rent of a mill, we must take into consideration all the risks of the business in which it is to be used. Rents are graduated

according to the value of the property and to an average of profits arrived at by very extended observation; and so accurate are the results of experience in this respect that rents are rendered nearly if not quite as certain as the market value of commodities at a particular time and place.

The proper rule for estimating this portion of the damages in the present case was, to ascertain what would have been a fair price to pay for the use of the engine and machinery, in view of all the hazards and chances of the business; and this is the rule which I understand the referee to have adopted. There is no error in the other allowances made by the referee. The judgment should therefore be affirmed.

All the judges concurring.

Judgment affirmed.

ALLISON *v.* CHANDLER.

Michigan, 1863. 11 Mich. 542.

Christiancy, J.[1] Since, from the nature of the case, the damages cannot be estimated with certainty, and there is a risk of giving by one course of trial less, and by the other more than a fair compensation — to say nothing of justice — does not sound policy require that the risk should be thrown upon the wrong doer instead of the injured party? However this question may be answered, we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation, than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injury, though the amount thus excluded cannot be estimated with accuracy by a fixed and certain rule. Certainty is doubtless very desirable in estimating damages in all cases: and where, from the nature and circumstances of the case, a rule can be discovered by which adequate com-

[1] Part of the opinion is omitted.

pensation can be accurately measured, the rule should be applied in actions of tort, as well as in those upon contract. Such is quite generally the case in trespass and trover for the taking or conversion of personal property; if the property (as it generally is) be such as can be readily obtained in the market and has a market value. But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal) because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice. And, though a rule of certainty may be found which will measure a portion and only a portion of the damages, and exclude a very material portion, which it can be rendered morally certain the injured party has sustained, though its exact amount cannot be measured by a fixed rule; here to apply any such rule to the whole case, is to misapply it: and so far as it excludes all damages which cannot be measured by it, it perpetrates positive injustice under the pretence of administering justice.

The law does not require impossibilities; and cannot therefore require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages, than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require,

and as may tend to prevent the allowance of such as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury.

In the adoption of this course it will seldom happen that the court, hearing the evidence, will not thereby possess the means of forming a satisfactory judgment whether the damages are unreasonable, or exorbitant; and, if satisfied they are so, the court have always the power to set aside the verdict and grant a new trial.

The justice of the principles we have endeavored to explain will, we think, be sufficiently manifest in their application to the present case. The evidence strongly tended to show an ouster of the plaintiff for the balance of the term, by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he cannot justly be limited to such sum — or the difference between the rent he was paying and the fair rental value of the premises — if the premises were of much greater and peculiar value to him, on account of the business he had established in the store, and the resort of customers to that particular place, or the good will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store, and place of business for the repairing of watches, making gold pens, &c. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct and immediate consequence of the injury. To confine the plaintiff to the difference between

the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of one thousand dollars per year; and he is ousted from the premises and this business entirely broken up for the balance of the time; can he be allowed to recover nothing but six cents damages for his loss? To ask such a question is to answer it. The rule which would confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for his business, and that for the same rent; and to justify such a rule of damages this assumption must be taken as a conclusive presumption of law. However such a presumption might be likely to accord with the fact in the city of New York, in most western cities and towns it would be so obviously contrary to the common experience of the facts, as to make the injustice of the rule gross and palpable. But we need not further discuss this point, as a denial of any such presumption was clearly involved in our former decision.

The plaintiff in this case did hire another store, "the best he could obtain, but not nearly so good for his business" — "his customers did not come to the new store, and there was not so much of a thoroughfare by it, not one quarter of the travel, and he relied much upon chance custom, especially in the watch-repairing and other mechanical business." This injury to the plaintiff's business was as clearly a part of his damages as the loss of the term itself. This point also was decided in the former case, and we there further held that the declaration was sufficient to admit the proof of this species of loss.

Now if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary

consequence, that the value of that business before the injury as well as after, not only might, but *should* be shown, as an indispensable means of showing the amount of loss from the injury. If the business were a losing one to the plaintiff before, his loss from its being broken up or diminished (if anything) would certainly be less than if it were a profitable one. It is not the *amount of business done*, but the *gain* or *profit* arising from it, which constitutes its value.

DENNIS *v.* MAXFIELD.

Massachusetts, 1865. 10 All. 138.

CONTRACT brought by the master against the owners of the whaling ship Harrison, to recover damages for a breach of a contract by which they had employed him for a whaling voyage. The contract was contained in a shipping paper, for "a whaling voyage of five years' duration from the sailing of the said ship from the port of New Bedford, unless said ship shall sooner return to said port and the voyage be terminated;" and in a written agreement by which it was provided as follows: "The said Dennis agreeing on his part to perform a whaling voyage as master of the said ship Harrison, to the best of his ability and knowledge; and the said Maxfield as agent on his part agrees to pay for the services of the said Dennis in the manner following: One fourteenth lay on net proceeds of whole cargo, and one dollar per barrel on all sperm oil taken. In addition to the above, to have five hundred dollars if the cargo amounts to $70,000; and $1000 to be added when it shall amount to $90,000; and $2000 more to be added to the aforesaid amount when the cargo amounts to $100,000. Also to have one hundred dollars for each and every thousand dollars that the cargo may exceed one hundred thousand dollars."

The declaration averred that the plaintiff sailed from New Bedford, in pursuance of the above contract, on the 17th of

May, 1858, and well and truly performed his duty until the 20th of November, 1860, when the defendants wrongfully deposed and removed him at the Sandwich Islands.[1]

Bigelow, C.J. Of the several rulings made at the trial of this case, three only seem to be open for revision on the exceptions.

1. The first relates to the right of the plaintiff to recover in this action the amount of his share of the earnings which had accrued under his contract with the defendants prior to his removal by them from the command of the vessel. The action is brought for a breach of an entire contract for services. The plaintiff has a right to recover as damages the amount which is lawfully due to him under the stipulations by which his compensation for these services was to be regulated and governed. This includes the wages which he had earned previous to his removal, as well as those which he was prevented from earning by his wrongful discharge. The breach of the contract by the defendants has created only one cause of action in favor of the plaintiff. His compensation for this breach necessarily embraces all that he is entitled to recover under the contract. Indeed his right to recover anything, as well that which was earned before as that which would have been earned if he had not been discharged, depends on the question whether he has performed his part of the contract. A party cannot sever a claim for damages arising under one contract so as to make two distinct and substantive causes of action. We are therefore all of opinion that the sum due to the plaintiff prior to his discharge, when it shall have been ascertained by an assessor, ought to be added to the amount of the verdict.

2. We think it equally clear that the plaintiff is entitled to recover in this action his share or proportion of the future profits or earnings of the vessel after his discharge by the defendants. These constitute a valid claim for damages, because the parties have expressly stipulated that profits should be the basis on which a portion of the plaintiff's

[1] The statement of facts and part of the opinion are omitted.

compensation for services should be reckoned. These earnings or profits were therefore within the direct contemplation of the parties, when the contract was entered into. They are undoubtedly in their nature contingent and speculative and difficult of estimation; but, being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled. Would it be a good bar to a claim for damages for breach of articles of copartnership, that the profits of the contemplated business were uncertain, contingent, and difficult of proof, and could it be held for this reason that no recovery could be had in case of a breach of such a contract? Or in an action on a policy of insurance on profits, would it be a valid defence in the event of loss to say that no damages could be claimed or proved because the subject of insurance was merely speculative, and the *data* on which the profits must be calculated were necessarily inadequate and insufficient to constitute a safe basis on which to rest a claim for indemnity? The answer is, that in such cases the parties, having by their contract adopted a contingent, uncertain, and speculative measure of damages, must abide by it, and courts and juries must approximate as nearly as possible to the truth in endeavoring to ascertain the amount which a party may be entitled to recover on such a contract in the event of a breach. If this is not the rule of law, we do not see that there is any alternative short of declaring that where parties negotiate for compensation or indemnity in the form of an agreement for profits or a share of them, no recovery can be had on such a contract in a court of law, — a proposition which is manifestly absurd.

There are doubtless many cases where no claim for a loss of profits can properly constitute an element of damage in an action for breach of a contract. These, however, are cases in which there was no stipulation for compensation by a share of the profits, and where they were not within the contemplation of the parties, and did not form a natural, necessary, or

proximate result of a breach of the contract declared on Fox *v.* Harding, 7 Cush. 516. But these cases are no authority for the broad proposition that in no case whatever can profits be included in estimating damages for a breach of a contract. In Johnson *v.* Arnold, 2 Cush. 46, cited by the defendants' counsel, the court decided only that, in an action for breach of contract for services, by which it was agreed that a party should be compensated by a share of the profits, the damages were not to be limited exclusively to the loss of profits, but might include other elements, if satisfactorily proved. In Brown *v.* Smith, 12 Cush. 366, the action was against the master of a whaling-vessel for misconduct and mismanagement, by which the voyage was broken up. It was held that no conjectural or possible profits of the voyage could be taken into consideration in estimating the damages. This decision stands on the ground that there were no stipulations in the contract concerning profits, nor were they, so far as appeared, in contemplation of the parties when the contract was made, nor a necessary or proximate consequence of its breach. Besides, it was only a claim for conjectural or possible profits which was rejected by the court in that case, and not profits which were capable of being proved by competent evidence, as in the case at bar.

CHAPMAN *v.* KIRBY.

Illinois, 1868. 49 Ill. 211.

Walker, J.[1] It appears, from the evidence in this case, that Pomeroy Brothers, on the 1st day of May, 1864, were the owners of a planing-mill and premises in the city of Chicago, and by a deed duly executed, leased to appellee a portion of the premises and a quantity of steam power, which was specified, from the 1st day of May, 1864, until the 1st day of January, 1869, at a specified rent. . . .

[1] Part of the opinion is omitted.

It appears that Pomeroy Brothers assigned their lease to A. C. Hesing, and he to the appellant, Chapman. On the 1st of June, 1867, Chapman severed the connecting shaft, just outside of the portion of the premises held by appellee, which connected with the engine and supplied appellee with power, and thus stopped his machinery. And for this act, on the part of Chapman, appellee brought an action on the case, to recover for the damages he claims to have sustained. . . .

This was an action on the case, and not on contract. In all actions of tort, the measure of damages is not less than the amount of damages sustained, and in case, all of the consequential damages sustained, connected with or flowing from the act complained of by the plaintiff. But the damages must be the necessary and natural consequence of the act. They must be real, and not merely speculative or probable. And if, by withdrawing the steam power on the 1st of June, and a failure to restore it until the 1st of November following, his leasehold estate became reduced in value, and his stock and machinery were depreciated, and his business was broken up, and his customers were diverted to other places of business, these were all proper elements for the consideration of the jury in ascertaining the amount of damages sustained by appellee. And if all these things did occur, and were the direct result of appellants' wrongful act, they should make good the loss. It cannot be held that, after the power was withheld, appellee should remain inactive, hold his machinery, unfinished stock, and fixtures, until the end of his term, undisposed of, and his capital tied up and yielding him nothing. No rule of law or principle of justice could require such a course. When the power was withheld, appellee had a right to suppose that it would be permanent, and to dispose of his lease, stock, machinery, and fixtures on the best terms he could obtain. And there can be no doubt that appellants should be held liable for any loss that might be sustained by such a sale.

Appellants, having committed the wrong, must be held liable for all losses that flow from it. And if the loss on these vari-

ous articles was the necessary and proximate result of the act, — and of that the jury must judge from the evidence, — they must be held liable. It cannot be said that, when the lease has been destroyed or rendered valueless, the buildings, machinery, and stock in trade have been depreciated, and a lucrative business destroyed by the wrongful act of another, the sufferer shall only receive nominal damages, or the mere damages equal only to the value of the lease over and above the rent. The person thus wronged is entitled to recover for all of the injury he has sustained.

As to the estimate of losses sustained by the breaking up of his established business, there would seem to be no well-founded objection. We all know that in many, if not all, professions and callings, years of effort, skill, and toil are necessary to establish a profitable business, and that when established it is worth more than capital. Can it then be said, that a party deprived of it has no remedy, and can recover nothing for its loss, when produced by another? It has long been well-recognized law, that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show, that by depression in trade, or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damages can be shown by demonstration. But by this means they can be ascertained with a reasonable degree of certainty. Nor do the views here expressed conflict with the case of Green *v.* Williams, 45 Ill. 206, as in that case the lessee had not entered upon the term; had not built up or established a business, and had not suffered such a loss. There was not in that case any basis upon which to determine

whether there ever would be any profits, or upon which to estimate them. The case of Cilley *v.* Hawkins, 48 Ill. 308, proceeds upon the same principle.

The evidence as well as the instruction in reference to the profits and losses, were proper. That instruction being proper, the reverse was improper, and was correctly refused. Nor is there any force in the objection that appellee was not confined to the value of his lease from the time the power was withheld until it was connected with the machinery, some five months afterwards. Appellee had sold out, his business was destroyed, and he was not bound to re-establish his business, when he had no assurance that it would be continued during the remainder of his term. Appellants had cut off the power under such circumstances as warranted him in believing that it was intended to deprive him of the use of the power, and he was not bound to suppose appellants would be more disposed to regard his rights in the future than they had been in the past. If appellants had repented, and were then disposed to retract, they must not complain if appellee was unwilling to trust their future conduct, as by their own disregard of his rights in the past, they could not expect him to confide in them in the future. The instructions fairly presented the case to the jury, and the evidence sustains the verdict.

The judgment of the court below must be affirmed.

Judgment affirmed.

WOLCOTT *v.* MOUNT.

New Jersey, 1873. 36 N. J. L. 262.

Wolcott kept a store of general merchandise, and among other articles advertised and kept agricultural seeds for sale. Mount went to the store and asked for early strap-leaf red-top turnip seed, and Wolcott showed him and sold to him two pounds of seed as such. Mount sowed the same on his land, which he had prepared with care and great expense for the

purpose. Mount had been in the habit, year after year, to sow early strap-leaf red-top turnip seed, to produce turnips for the early New York market, such kind and description of turnips yielding a large profit, and he, at time of purchase, stated that he wished this description and kind of seed for that purpose.

The seed sold to Mount by Wolcott was sown upon the ground prepared for same by Mount, and the turnips produced therefrom were not early strap-leaf red-top turnips, but turnips of a different kind and description, to wit, Russia, late, and not salable in market, and only fit for cattle, and he lost his entire crop. The plaintiff proved that the seed sold him by Wolcott was not early strap-leaf red-top turnip seed, but seed of a different kind and description, to wit, Russia turnip seed, and that it produced no profit to him, and that early strap-leaf red-top turnip seed on same ground in other years had produced large profits to Mount, and on adjoining ground, prepared in same way, the same year, had produced great profits to the owner, and that Mount was damaged thereby.

It is agreed that this kind of turnip seed cannot be known and distinguished, by the examination through sight or touch, from Russia or other kinds, but only by the kind of turnips it produces after sowing can it be known.[1]

Depue, J. The contention of the defendants' counsel was, that the damages recoverable should have been limited to the price paid for the seed, and that all damages beyond a restitution of the consideration were too speculative and remote to come within the rules for measuring damages. As the market price of the seed which the plaintiff got, and had the benefit of in a crop, though of an inferior quality, was probably the same as the market price of the seed ordered, the defendants' rule of damages would leave the plaintiff remediless. . . .

It must not be supposed that under the principle of Hadley

[1] The statement of facts has been slightly condensed, and part of the opinion omitted.

v. Baxendale mere speculative profits, such as might be conjectured to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains from which are entirely conjectural, with respect to which no means exist of ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract, that the plaintiff must establish the *quantum* of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty.

For instance, profits expected to be made from a whaling voyage, the gains from which depend in a great measure upon chance, are too purely conjectural to be capable of entering into compensation for the non-performance of a contract, by reason of which the adventure was defeated. For a similar reason, the loss of the value of a crop for which the seed had not been sown, the yield from which, if planted, would depend upon the contingencies of weather and season, would be excluded as incapable of estimation, with that degree of certainty which the law exacts in the proof of damages. But if the vessel is under charter, or engaged in a trade, the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sowed on the ground prepared for cultivation, and the plaintiff's complaint is, that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimation of the injury resulting from the loss of profits of this character.

In this case the defendants had express notice of the intended use of the seed. Indeed, the fact of the sale of seeds by a dealer keeping them for sale for gardening purposes, to a purchaser engaged in that business, would of itself imply

knowledge of the use which was intended, sufficient to amount to notice. The ground was prepared and sowed, and a crop produced. The uncertainty of the quantity of the crop, dependent upon the condition of weather and season, was removed by the yield of the ground under the precise circumstances to which the seed ordered would have been exposed. The difference between the market value of the crop raised, and the same crop from the seed ordered, would be the correct criterion of the extent of the loss. Compensation on that basis may be recovered in damages for the injury sustained as the natural consequence of the breach of the contract. Randell *v.* Raper, E. B. & E. 84; Lovegrove *v.* Fisher, 2 F. & F. 128.

From the state of the case, it must be presumed that the court below adopted this rule as the measure of damages, and the judgment should be affirmed.

MASTERTON *v.* MOUNT VERNON.

New York, 1874. 58 N. Y. 391.

This action was brought to recover damages for injuries received by plaintiff being thrown from his wagon in one of the streets of the village of Mount Vernon.[1]

Grover, J. I think the judge erred in overruling the defendant's objection to the following question: About what had been your profits, year by year, in that business? The plaintiff had testified that he was engaged in the tea importing and jobbing business, buying and selling teas, and had been for a great number of years. That he had a partner who attended to the sales, while he made the purchases. That in purchasing teas a high degree of skill was necessary, which the plaintiff possessed. That the business was extensive. That in consequence of the injury the plaintiff could not purchase teas, and there was a great falling off in the

[1] Part of the case is omitted.

business of the firm. In Lincoln v. Saratoga and S. Railroad Co., 23 Wend. 425, it was held, in an analogous case, that the plaintiff might prove that he was engaged in the dry-goods business, and its extent, but there was no attempt to prove the past profits of the business, with a view to show what the future would be. Where, in such a case, the plaintiff has received a fixed compensation for his services, or his earnings can be shown with reasonable certainty, the proof is competent. McIntyre v. N. Y. C. R. R. Co., 37 N. Y. 287; Grant v. The City of Brooklyn, 41 Barb. 381. In Nebraska City v. Campbell, 2 Black, 590, it was held that proof that the plaintiff was a physician, and the extent of his practice, was competent. Wade v. Leroy, 20 How. (U. S.) 24, held the same. In none of these cases is any intimation given that proof may be given as to the uncertain future profits of commercial business, or that the amount of past profits derived therefrom may be shown, to enable the jury to conjecture what the future might probably be. These profits depend upon too many contingencies, and are altogether too uncertain to furnish any safe guide in fixing the amount of damages. In Walker v. The Erie R. R. Co., 63 Barb. 260, it was held that proof of the amount of income derived by the plaintiff for the year preceding the injury, from the practice of his profession as a lawyer, was competent This goes beyond the rule adopted in any of the other cases, and it certainly ought not to be further extended. Whether proof of the income derived by a lawyer from the past practice of his profession is competent for the purpose of authorizing the jury to draw an inference as to the extent of the loss sustained by inability to personally attend to business, may, I think, well be doubted. There is no such uniformity in the amount in different years, as a general rule, as to make such inference reliable. But the profits of importing and selling teas are still more uncertain. In some years they may be large, and in others attended with loss. The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually

paid to persons doing such business for others. These are circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures in which the plaintiff, if uninjured, would have been engaged.

The judgment appealed from should be reversed, and a new trial ordered, costs to abide the event.

HOWE MACHINE COMPANY *v.* BRYSON.

Iowa, 1876. 44 Ia. 159.

Adams, J. The defendants introduced evidence tending to establish the breach of the contract by Stebbins & Co., as set up in the answer; that they had failed to supply a large number of machines which defendants could have sold, and proof was also introduced tending to show that defendants for about eight months had devoted their whole time to the business, canvassing the county for the sale of machines and introducing them to the attention and favor of the people; that they had rented a room, purchased a team and made other preparations for the prosecution of the business; that during the whole time they were making almost constant applications for machines, and a number were supplied them, but insufficient to meet the demand of the market, and that Stebbins & Co. made promises and held out inducements for them to believe that a sufficient number would be sent them to supply the demand created by their efforts to recommend them to the public.

Upon this evidence the court gave the jury the following instructions: —

"The verbal contract alleged in the defendants' counterclaim is a contract of employment, and if you find from the evidence that it has been sufficiently proved, and that J. A. Stebbins & Co. broke the contract on their part, and that the defendants were necessarily idle, because of such breach and

suffered injury thereby, then for such breach you should allow defendants such damages as would make them whole for such breach, and in considering the value of the time which defendants were necessarily idle, you must take into consideration in this case the fitness of defendants for the services contracted for, the preparations and appliances which they had and had made to sell the machines, the market demand for such machines in this county; and, from all the evidence and circumstances as shown in evidence, you will determine the value of the time lost by defendants by reason of the breach of the contract by Stebbins & Co.

"As the contract alleged is one for the entire services of defendants, including the team, and as there is no agreement alleged that Stebbins & Co. were to pay for the keeping of the team or rent of room or for advertising, you cannot allow the defendants therefor.

"Under the contract as alleged, the defendants would be bound to furnish the team, their keeping, and to pay for the room rent and for advertising, and their compensation for all these things was covered by the discount price which defendants were to have from the retail price of the machines sold."

The giving of the foregoing instructions is assigned as error.

It was held by the District Court that the defendants are entitled to recover the value of the time during which they were necessarily idle. In directing the jury, however, as to how they should arrive at the value of such time we think the court erred.

On this point the court said: "In considering the value of the time which defendants were necessarily idle you must take into consideration the fitness of the defendants for the services contracted for, the preparations and appliances which they had made to sell the machines, and the market demand for such machines in this county."

It is evident from the foregoing that the court considered that the value of defendants' time was to be estimated with

reference to the profits which they might have made under the contract if it had not been broken. The court does not, to be sure, expressly say that the value of the time which defendants lost would be the profits which they might have made, but if the market demand for the machines was to be considered in arriving at the value of the time, such demand was to affect its estimate; to what extent the court does not say. We are of the opinion that the defendants' damages were either the loss of profits which they might have made or the value of the time during which they were idle, estimated without reference to the profits, with their reasonable expenditures added. We know of no way of estimating loss of time with reference to the profits which might have been made without making the loss of profits the real ground of the damages. If a book-keeper is induced to discontinue his ordinary business by reason of being employed to sell goods upon commission, and the goods are not furnished and he loses time while holding himself in readiness, his damages are either the reasonable value of such a book-keeper's time, or the net profits which might have been made if the contract had not been broken. They are certainly far from identical, and we know of no middle ground between the two. The fact that the value of defendants' time might not be susceptible of as definite estimation as that of a book-keeper, or other person engaged in some well-defined industry in general demand, can make no difference.

The real question in this case, then, is: Are the defendants entitled to recover for loss of time or loss of profits? We are of the opinion that they are entitled to recover for loss of time. To this should be added, to be sure, their reasonable expenditures.

We would not be understood as holding that where a person is employed to sell goods on commission and the employer fails to furnish the goods, the person employed may not recover for loss of profits which he might have made if the goods had been furnished. If the quantity to be furnished was a definite amount and the demand was practically

unlimited, possibly he might be allowed to recover for loss of profits.

But where a person employs another to sell on commission all the goods he can within a limited territory, especially if the goods are of that kind of which there is no regular consumption or demand, the case is quite different; and such is the present case.

The number of sewing-machines of a particular kind which can be sold within a given county and within a given time, is very uncertain. Few cases can be found where profits have been disallowed as speculative in which the uncertainty is greater.

Griffin *v.* Colver, 16 N. Y. 490, is regarded as a somewhat leading case. The plaintiff agreed with defendant to furnish a steam-engine to drive certain machinery used for planing lumber, and failed to do so within the time agreed. Suit being brought by him to recover for the engine, the defendant claimed damages for loss sustained by him by reason of his machinery being idle between the time the engine should have been furnished and the time it was furnished. He claimed that he was entitled to recover the amount of the net profits which would have been made if the engine had been furnished, as agreed. It was held, however, that such was not the proper measure of damages, but that he might recover a reasonable compensation for the investment in the machinery during the time the same was idle. The general doctrine is succinctly stated by Selden, J., as follows: "It is a well-established rule of the common law, that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should, *per se*, prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not." Yet the difficulty of determining what would have been the net profits of

the planing-mill was small compared with the difficulty of determining what profits the defendants in the present case would have made upon all the machines which they could have sold in the county of Mitchell, within the time in question.

If the demand for planed lumber had been limited to a territory, and such demand was less than the capacity of the mill, that case would have been somewhat like the present one.

In Blanchard *v.* Ely, 21 Wend. 342, plaintiff brought suit to recover for building a steamboat. The defendant showed that a part of the machinery was defective, and that by reason thereof he failed to make several trips with the boat which he would have made, and claimed to recover for loss of profits on those trips. It was held that such profits were too uncertain, and were accordingly disallowed. Yet, if we suppose that the boat could have been employed to its full capacity, the profits were not uncertain in any such sense as in the present case. An attempt is made by defendants to show how many sewing-machines they could have sold, by showing how many they did sell during the time they were supplied with them.

But this basis of calculation is very unreliable. In a limited territory the more vigorous the canvass has been, the more nearly it is exhausted. The number of machines sold, if large, might be in inverse ratio to the number of those which could thereafter be sold. Yet no other basis of calculation is offered, and we know of none which is not equally unsatisfactory. It is certain that an inventory of the people in a county, who will buy a sewing-machine of a particular kind, within a given time, cannot be taken.

In Masterton *v.* The Mayor, etc., of Brooklyn, 7 Hill, 61, damages were allowed for loss of profits, but the decision was put expressly upon the ground that the profits did not depend upon the fluctuations of the market, or the chances of business.

The appellees rely upon Richmond *v.* The Dubuque & Sioux City R. R. Co., 33 Iowa, 422. In that case the plain-

tiff sought to recover for storage on grain. He had erected an elevator at great expense for the purpose of storing grain for the defendant.

Afterwards the defendant made a different arrangement, whereby the grain shipped upon the road did not pass through the elevator. The evidence which was offered to show what the storage would have amounted to is not set out in the opinion, but the majority of the court thought that it was sufficient to show approximately what the storage would have been. If so, the plaintiffs were of course entitled to recover the amount of the net profits which would have been made.

We cannot regard that case as decisive of the present one, nor has any case been cited which to our mind holds the doctrine for which the appellees contend.

We are of the opinion, therefore, that while the district court was correct in instructing the jury, that the defendants might recover for the value of the time which they lost, the court erred by instructing in the same connection, that the jury might take into consideration the market demand for the machines in the county. The value of the time which the defendants lost should have been estimated generally, and without reference to the profits which might have been made under the contract. *Reversed.*

Beck, J., *dissenting.* — I dissent from the conclusion reached by my brothers in the foregoing opinion, and will proceed, as briefly as I can, to give the grounds of my objection thereto.

I am of the opinion that the instructions given by the court to the jury fairly present the rules of law applicable to the case. The contract in question is clearly one of employment of the defendants. They were to devote their whole time to the service of Stebbins & Co., in the sale of the machines. The compensation was to depend upon their activity and capacity for the business, and the demand for the articles to be sold, conditions which, under favorable circumstances, would result to their advantage, and under any

circumstances would be favorable to the interest of the other contracting party. This compensation could not be determined by the value of the labor of a man and woman, when hired for like employment upon a stipulated or customary salary. In such a case the employee takes no risk as to the demand of the market or as to other circumstances which would affect sales, but in this case such risks were assumed by defendants. It is very plain that they ought to be compensated in the manner provided by the contract, which was dependent upon the machines to be sold. But, as Stebbins & Co. failed to supply them with machines to meet the existing demand, it became necessary for the jury to determine, under the evidence, the number required by such demand. The fact that this cannot be determined with entire certainty, that, to a great extent, the question depends upon collateral facts and the opinion of the witnesses, cannot defeat defendants in their claim for just compensation on account of the loss they sustain by the default of the other party. Defendants are, in justice, entitled to receive, as compensation, twenty-five per centum of the proceeds of all sales that would have been made by them had plaintiffs performed their contract. If defendants cannot be permitted to establish, by competent proof, facts from which the jury can reasonably infer the number of such sales, the law would fail to render them just and full compensation for the loss sustained by the breach of the contract. See Richmond *v.* Dubuque & S. C. R. Co., 26 Iowa, 191; s. c., 33 Iowa, 422; s. c., 40 Iowa, 264; Gilbert *v.* Kennedy, 22 Mich. 117; Cunningham *v.* Dorsey, 6 Cal. 19.

In Richmond *v.* Dubuque & S. C. R. Co., the plaintiff was permitted to recover the profits he would have realized upon handling and storing grain, which would have been received at his elevator, had defendant performed its contract. These profits were the difference between the cost of storing and handling and the price as fixed in the contract sued upon. The contract was to run through a long series of years. The number of bushels which plaintiff would have

stored and handled, was determined by evidence which related to the demands of trade, the productions of the country, etc., etc. The impossibility of arriving at an accurate estimate of the business that would have been done was not considered an impediment to plaintiff's recovery; an approximation was considered sufficient.

In the case at bar defendants' damages are established by considering like facts, which can be proved with equal certainty. Other cases, of like import with those cited, can be mentioned, but additional authorities are not deemed necessary to support the conclusion I have reached upon this branch of the case.

Should it be thought that defendants' compensation partakes of the nature of the profits of the business in which, under their contract, they were engaged, this does not preclude them from recovering the amount they would have realized had plaintiff supplied them with the machines contemplated by the contract. Profits which are the certain gains that would have resulted from the performance of the contract are recoverable as damages. Philadelphia, Wilmington, etc. R. Co. *v.* Howard, 13 Howard, 307; Hoy *v.* Grumble, 34 Pa. St. 9; Cunningham *v.* Dorsey, 6 Cal. 19.

The opinion of my brothers disregards an elementary rule for determining damages recoverable upon contracts. It is this: "The contract itself furnishes the measure of damages." Sedgwick's Measure of Damages, 200.

Here is a contract for the services of defendants during a time fixed therein. Defendants were to devote their time, with the use of a team and room, to the employment specified in the contract. The opinion of my brothers holds that they are to be compensated for their time, "the loss of time," and for the use of the team. They can recover only upon the contract, for their services were to be given under the contract, and plaintiff was bound in no other manner than by this contract. The contract must furnish the measure of damages to which defendants are entitled on account

of plaintiff's breach thereof. They are entitled to the sum which they would have earned, for so the contract provides, and the agreement furnishes the data upon which the estimate of their earnings may be made. We have seen, that because an element of profits may enter into the damages, they are not for that reason to be denied. Nor is it a sufficient ground for refusing such compensation, to show that the determination of the exact amount of such damages is impossible. "But justice is, after all, but an approximate science, and its ends are not to be defeated by a failure of strict and mathematical proof." Sedgwick on Measure of Damages, p. 635 (marg. p. 593).

Mr. Justice Story, in an insurance case, uses the following language, which is quoted by the author just named: "Absolute certainty in cases of this sort is unattainable. All we can arrive at is an approximation thereto; and yet no man ever doubted that such a loss must be paid for, if it is covered by the policy." Rogers *v.* Mechanics' Ins. Co., 1 Story, 300.

The damages which, under instructions given by the court, the defendants were entitled to recover are no more uncertain than those recovered in Richmond *v.* The Dubuque & Sioux City Railway Co., *supra*. Like the damages in that case, they are determined by the contract between the parties, and the cases resemble also in the fact that elements of profit enter largely into the damages, and in the further fact that recovery in each case was sought for services and expenses rendered and incurred by the respective parties. Surely, if it was admissible to show, in the case just named, how many bushels of grain plaintiff would handle, for which he was to receive one or two cents a bushel, and from which was to be deducted the expenses of running his machinery and the like, for a long series of years, thus ascertaining the profits he was entitled to recover, which depended largely upon the course of trade, was controlled by prices, and was materially affected by the character of the seasons, the progress of improvements in the country, etc., in this case it cannot be regarded that

the evidence establishing the number of machines defendants would have sold is too uncertain to authorize the recovery of damages based thereon. In Richmond *v.* The Dubuque & Sioux City R'y Co. damages were estimated upon the number of bushels of wheat which would have been handled by plaintiff; in this case defendants claim to recover for the number of machines they would have sold. I am unable to distinguish between the cases in this respect.

In my opinion, the cases cited in the opinion of the majority of the court are not applicable to the point they are cited to support. In Griffin *v.* Colver, 16 N. Y. 490, the contract upon which recovery of damages was sought on account of its breach was the delivery of a steam-engine. It was held that the net profits of the use of the machinery for the time it was idle on account of the non-delivery of the engine did not constitute plaintiff's damage. The contract in that case did not contemplate the use of the engine, but simply provided for its delivery. The damages based upon profits, which the court allowed in that case and the one next named, were the loss sustained by the respective plaintiffs, upon dependent or collateral contracts entered into upon the expectation of the performance of the contracts in suit. They were not the direct consequences flowing from the contracts. If it had bound the contracting party to furnish the engine for use during a specified time, to supply motive power for the machinery, it would be like the case before us, but it simply involves the sale of property and failure to deliver it.

Blanchard *v.* Ely, 21 Wend. 342, is a case like the other one just named. It involved a contract for *building* a steamboat. Had the contract provided for furnishing a steamboat for use for a certain time, it would, in that case, have been of the character of the contract in the case before us, and the defaulting party would have been liable for the loss of profits resulting from the violation of his obligation. In the cases supposed, as the one in hand, the contracts themselves would point to the profits as the damages sustained in their violation.

Defendants in this case were, under the contract, to render certain services for plaintiff, which failed to give them employment; the compensation provided for in the contract is the measure of damages. That this compensation may be approximately shown, and the law requires nothing more, I think, cannot be doubted.

The twenty-five per centum upon the prices of the machines sold or to be sold by defendants, cannot be regarded as profits. It was simply the manner of fixing in the contract defendants' compensation, and no idea of profits enters into it. But should profits enter into, and become a part of defendants' compensation, which would be increased by certain contingencies, they must nevertheless be considered in ascertaining the damages recoverable for a violation of the contract. If defendants' compensation depended wholly upon profits of the business, they could recover under the contract whatever profits they would have earned. Masterton *v.* The City of Brooklyn, 7 Hill, 61, cited in the majority opinion supports this position. In that case the plaintiff had contracted with defendant, to deliver a large quantity of marble which would require the labor of five years. After the delivery of a part of the marble (payment being made therefor), defendant refused to receive any more, and thereupon plaintiff brought suit on the contract, and recovered $72,999 damages. The court used the following language in its opinion: "When the books and cases speak of the profits anticipated from a good bargain, as matters too remote and uncertain to be taken into account in ascertaining the measure of damages, they usually have relation to *dependent and collateral engagements*, entered into on the faith and in expectation of the performance of the principal contract. . . . But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very element; something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfil-

ment of any other stipulation. They are presumed to have been taken into consideration, and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement."

I think I have shown that the contract provides for the compensation, which the instructions given by the court authorized the jury to find as defendants' damages. These damages are provided for by the contract itself. That they may be proved to that degree of approximation required by the law, I cannot doubt. In this respect, the case is susceptible of a nearer approximation to the exact amount of damages sustained, than could have been attained in Richmond *v.* The Dubuque & Sioux City R'y Co.

The limitation of defendants' damages to the value of their services during the time they were employed, as is done in the majority opinion, deprives them of the real benefits of the contract, and fixes their compensation at an amount not provided for therein. This the law will not do.

The decision in this case, in my judgment, misapplies the rules of the law, works injustice to defendants, and will prove mischievous as a precedent.

DAY, J. I concur in the conclusions of the dissenting opinion of my brother Beck. The measure of damages should depend upon and bear a relation to the contract, for the breach of which damage is claimed. A party who has a contract for service by the month, either with or without stipulation as to price, sustains a damage by the breach of the contract, which is susceptible of easy determination. If he has not neglected to avail himself of opportunities for employment, the measure of his damage is the sum agreed to be paid, or the reasonable value of his services for the time for which he was employed. A party who, like these defendants, has a contract under which he is to receive a certain per centum upon specific articles sold, may make much more or much less than the party who is employed by the month. If there is a breach of his contract, he may be

damaged much more, or much less, than the other. If damaged less, he ought not to recover as much; if damaged more, he ought to be compensated for his loss. In case of a breach of contract these two persons ought not to be reduced to the same measure of recovery. The law ought not to construct a Procrustean bed, upon which both parties are compelled to lie, and which both, even by mutilation if necessary, are compelled to fit.

BRIGHAM *v.* CARLISLE.

Alabama, 1884. 78 Ala. 243.

Clopton, J.[1] The material question is the measure of damages. The primary purpose of awarding damages is actual compensation to the party injured, whether by a tort or by breach of contract, though there are exceptional cases, in which exemplary or punitive damages are allowed. Owing to the ever-occurring differences in the circumstances, and in the special conditions of the contracting parties, it has been found difficult, if not impossible, to lay down general and definite rules as to the measure of damages, applicable to all cases of a class. From a misconstruction of expressions of eminent jurists, not sufficiently guarded for general use, but adapted to the case in hand, the applications of rules, commonly recognized, have been as various as the cases. The proposition, that all damages are recoverable which are in the contemplation of the parties, is not strictly correct. The primary rules are, the damages must be the natural and proximate results of the wrong complained of and the law must not be merely speculative, or conjectural. These must concur, though founded on different principles, and are distinct and independent of each other. The law presumes that a party foresees the natural and proximate results of a breach of his contract or tort, and hence these are presumed to be

[1] Part of the opinion is omitted.

in his legal contemplation. For such damages, as a general rule, the party at fault is liable.

But there are damages, which are in the contemplation of the parties at the time of making the contract, and are the natural and proximate results of its breach, which are not recoverable. The parties must necessarily contemplate the loss of profits as the direct and necessary consequence of the breach of a contract, and yet all profits are not within the scope of recoverable damages. There are numerous cases however in which profits constitute, not only an element, but the measure of damage. While the line of demarcation is often dim and shadowy, the distinctive features consist in the nature and character of the profits. When they form an elemental constituent of the contract, their loss, the natural result of its breach, and the amount can be estimated with reasonable certainty, such certainty as satisfies the mind of a prudent and impartial person, they are allowed. The requisite to their allowance is some standard, as regular market values or other established *data*, by reference to which the amount may be satisfactorily ascertained. Illustrations of profits recoverable are found in cases of sales of personal property at a fixed price, evictions of tenants by landlords, articles of partnership, and many commercial contracts.

On the other hand, "mere speculative profits, such as might be conjectured would be the probable result of an adventure, defeated by the breach of a contract, the gains from which are entirely conjectural, and with respect to which no means exist of ascertaining even approximately the probable results, cannot under any circumstances be brought within the range of recoverable damages." 1 Suth. Dam. 141. Profits speculative, conjectural, or remote, are not generally regarded as an element in estimating the damages. In Pollock *v.* Gantt, 69 Ala. 373 ; s. c., 44 Am. Rep. 519, it is said : "What are termed speculative damages — that is possible, or even probable gains, that it is claimed would have been realized, but for the tortious act or breach of contract charged against a defendant — are too remote, and cannot be recov-

ered." The same rule has been repeatedly asserted by this court. Culver *v.* Hill, 68 Ala. 66; Higgins *v.* Mansfield, 62 Ala. 267; Burton *v.* Holley, 29 Ala. 318; s. c., 65 Am. Dec. 401; White *v.* Miller, 71 N. Y. 118; s. c., 27 Am. Rep. 13; French *v.* Ramge, 2 Neb. 254; 2 Smith Lead. Cases, 574; Olmstead *v.* Burke, 25 Ill. 86. The two following cases may serve to illustrate the difference between profits recoverable and not recoverable. In Ætna Life Ins. Co. *v.* Nexsen, 84 Ind. 347; s. c., 43 Am. Rep. 91, an insurance agent, who had been discharged without cause before the expiration of his contract, was allowed to include in his recovery the probable value of renewals on policies previously obtained by him, upon which future premiums would, in the usual course of business, be received by the company, on the ground that the amount of compensation, due on such renewals, can be ascertained with requisite certainty by the use of actuary's life-tables and comparisons, and that the basis of the right to damages existed, and was not to be built in the future. In Lewis *v.* Atlas Mut. Ins. Co., 61 Mo. 534, which is cited with approval in the other case, the same rule as to the probable value of renewals was held, but it was also held, that an estimate of the probable earnings of the agent thereafter, derived from proof of the amount of his collections and commissions before the breach of the contract, in the absence of other proof, is too speculative to be admissible.

Profits are not excluded from recovery, because they are profits; but when excluded, it is on the ground that there are no criteria by which to estimate the amount with the certainty on which the adjudications of courts, and the findings of juries should be based. The amount is not susceptible of proof. In 3 Suth. Dam. 157, the author discriminatingly observes: "When it is advisedly said that profits are uncertain and speculative, and cannot be recovered, when there is an alleged loss of them, it is not meant that profits are not recoverable merely because they are such, nor because profits are necessarily speculative, contingent, and too uncertain to be proved; but they are rejected when they are so; and it is

probable that the inquiry for them has been generally proposed when it must end in fruitless uncertainty; and therefore it is more a general truth than a general principle, that a loss of profits is no ground on which damages can be given." When not allowed because speculative, contingent, and uncertain, their exclusion is founded by some on the ground of remoteness, and by others, on the presumption that they are not in the legal contemplation of the parties.

The plaintiff, by the contract, undertook the business of travelling salesman for the defendants. The amount of his commissions depended not merely on the number and amounts of sales he might make, but also on the proportional quantity of the two classes of goods sold, his commissions being different on each. The number and amounts of sales depended on many contingencies, the state of trade, the demand for such goods, their suitableness to the different markets, the fluctuations of business, the skill, energy, and industry with which he prosecuted the business, the time employed in effecting different sales, and upon the acceptance of sales by the defendants. There are no criteria, no established data, by reference to which the profits are capable of any estimate. They are purely speculative and conjectural. Besides, the evidence is the mere opinion and conjecture of the plaintiff without giving any facts on which it was based. The bare statement, uncorroborated by any facts, and without a basis, that "the reasonable sales would have been $15,000, and that the net profits on that amount of sales would have been $450," is too conjectural to be admissible. Washburn *v.* Hubbard, 6 Lans. 11.

Judgment reversed and remanded.

CHICAGO *v.* HUENERBEIN.

Illinois, 1877. 85 Ill. 594.

Mr. Justice Walker delivered the opinion of the court.

This was an action of case, against the city of Chicago, to

recover damages produced by throwing stone, earth, etc., into the mouth of a small stream that usually discharged into the canal, whereby water was dammed and flowed back on the land, and six or seven acres could not be planted or cultivated during the years 1871, 1872, and 1873. The court below permitted appellee to prove that if the land had been planted with potatoes, the ground would have yielded two hundred bushels to the acre, and that they would have sold at about an average of seventy cents per bushel when matured, and that it would have cost about $35 per acre to plant, cultivate, and market the potatoes. And thus it was claimed that the land would have yielded in the aggregate near 3,550 bushels, and would have sold for a much larger sum than was found by the jury.

On this evidence the jury found a verdict for plaintiff for the sum of $1,250, and the court, after overruling a motion for a new trial, rendered judgment on the verdict, and the city appeals.

The damages in this case are excessive, and the judgment must be reversed. The rule for the assessment of damages was wrong. In cases of this character the true measure is the fair rental value of the ground which was overflowed, and not the possible, or even the probable profits that might have been made, had the land not been overflowed. Such damages are too remote and speculative, depending on too large a variety of contingencies which might never have happened. The result of the application of the rule in this case shows its wrong and injustice. Here the rule adopted gave appellee nearly $74 per acre as an annual rent. This manifests the incorrectness of the rule.

But the case of the Chicago and Rock Island R. R. Co. *v.* Ward, 16 Ill. 522, is referred to, as sustaining the rule adopted by the court below. That case, in some of its features, is like the case at bar. In that case it was held, the proof of the average value of the crop at maturity was proper, as a means of ascertaining its value when destroyed. But there, the crop was planted, and partly if not fully cultivated

when destroyed, whilst here no crop was ever planted, nor was any preparation made to plant the ground. It was overflowed before the planting season had arrived. But even if the principle there announced is broad enough to embrace the rule adopted in this case, we must hold that it should not be adopted as the measure of damages. We see that it has produced wrong and injustice. The rule announced in that case has not been followed in subsequent cases. See Olmstead *v.* Burke, 25 Ill. 86; Cilley *v.* Hawkins, 48 Ill. 308; Green *v.* Williams, 45 Ill. 206, and Chapman *v.* Kirby, 49 Ill. 211.

Inasmuch as this land was not planted, and no one could know or calculate with any degree of certainty what such a crop would have produced had the ground been planted, the only certain measure of damages is the rental value of the land thus overflowed, and the use of which appellee was deprived. Any other is speculative and uncertain. Crops not planted are not in existence, and if planted are liable to so large a number of contingencies and accidents, that what they may yield can only be a matter of conjecture; and what land might produce, and what the crop would sell for when produced, is too uncertain to be adopted as a rule for the measure of damages when a person has been deprived of the use of land.

Objections have been urged to the declaration, but leave is given to appellee, if he choose, to amend, so as to remove the objections urged.

For the error indicated, the judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

WESTERN UNION TELEGRAPH CO. *v.* HALL.

United States Supreme Court, 1888. 124 U. S. 444.

PLAINTIFF furnished to defendant, a telegraph company, the following message for immediate transmittal: "Buy ten thousand if you think it safe. Wire me." Through the neg-

ligence of defendant the delivery of the message was delayed from 11.30 A. M. to 6 P. M., on November 9th, 1882. The meaning of the despatch was to direct Charles T. Hall, to whom it was addressed, to buy ten thousand barrels of petroleum if in his judgment it was best to do so. Had the despatch upon its first receipt at Oil City, Pa., been promptly delivered to Charles T. Hall, he would, by 12 M. of November 9th, have purchased ten thousand barrels of petroleum at the then market price of $1.17 per barrel for the plaintiff. When the despatch was delivered to Charles T. Hall, the exchange had been closed for that day, so that said Hall could not then purchase the petroleum ordered by plaintiff. At the opening of the board the next day the price had advanced to $1.35 per barrel, at which rate said Charles T. Hall did not deem it advisable to make the purchase, and hence did not do so.

It is not disclosed in the evidence whether the price of petroleum has advanced or receded since that date, Nov. 10, 1882.[1]

MATTHEWS, J. The view we take of this case requires us, in answer to the fourth question certified, to say that, in the circumstances disclosed by the record, the plaintiff was entitled only to recover nominal damages, and not the difference in value of the oil if it had been purchased on the day when the message ought to have been delivered and the market price to which it had risen on the next day. As the judgment was rendered in his favor for the latter sum, it must be reversed on that account, and, upon the facts found by the court, judgment rendered for nominal damages only, which finally disposes of the litigation. It, therefore, becomes unnecessary to consider or decide any of the other questions certified to us.

It is found as a fact that if the despatch upon its first receipt at Oil City had been promptly delivered to Charles T. Hall, to whom it was addressed, he would by twelve o'clock on that day have purchased ten thousand barrels of oil at the market price of $1.17 per barrel on the plaintiff's account.

[1] The statement of facts has been condensed.

He was unable to do so in consequence of the delay in the delivery of the message. On the next day the price had advanced to $1.35 per barrel, and no purchase was made because Charles T. Hall, to whom the message was addressed, did not deem it advisable to do so, the order being conditional on his opinion as to the expediency of executing it. If the order had been executed on the day when the message should have been delivered, there is nothing in the record to show whether the oil purchased would have been sold on the plaintiff's account on the next day or not; or that it was to be bought for resale. There was no order to sell it, and whether or not the plaintiff would or would not have sold it is altogether uncertain. If he had not done so, but had continued to hold the oil bought, there is also nothing in the record to show whether, up to the time of the bringing of this action, he would or would not have made a profit or suffered a loss, for it is not disclosed in the record whether during that period the price of oil advanced or receded from the price at the date of the intended purchase. The only theory, then, on which the plaintiff could show actual damage or loss is on the supposition that, if he had bought on the 9th of November, he might and would have sold on the 10th. It is the difference between the prices on those two days which was in fact allowed as the measure of his loss.

It is clear that in point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place.

It has been well settled since the decision in Masterton *v.* The Mayor of Brooklyn, 7 Hill, 61, that a plaintiff may right-

fully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfilment. In the language of the Supreme Judicial Court of Massachusetts in Fox *v.* Harding, 7 Cush. 516: "These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit" (p. 522). This rule was applied by this court in the case of The Philadelphia, Wilmington, and Baltimore Railroad *v.* Howard, 13 How. 307. In Griffin *v.* Colver, 16 N. Y. 489, the rule was stated to be that "the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed. The familiar rules on this subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last" (p. 495).

In Booth *v.* Spuyten Duyvil Rolling Mills Co., 60 N. Y. 487, the rule was stated to be that "the damages for which a party may recover for a breach of a contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative, or contingent" (p. 492). In White *v.* Miller, 71 N. Y. 118, 133, it was said: "Gains

prevented, as well as losses sustained, may be recovered as damages for a breach of contract, when they can be rendered reasonably certain by evidence, and have naturally resulted from the breach."

In cases of executory contracts for the purchase or sale of personal property ordinarily, the proper measure of damages is the difference between the contract price and the market price of the goods at the time when the contract is broken. This rule may be varied according to the principles established in Hadley *v.* Baxendale, 9 Exch. 341; s. c., 23 L. J. Ex. 179, where the contract is made in view of special circumstances in contemplation of both parties. That well-known case, it will be remembered, was an action against a carrier to recover damages occasioned by delay in the delivery of an article, by reason of which special injury was alleged. In the application of the rule to similar cases, where there has been delay in delivering by a carrier which amounts to a breach of contract, the plaintiff is not always entitled to recover the full amount of the damage actually sustained; *prima facie*, the damages which he is entitled to recover would be the difference in the value of the goods at the place of destination at the time they ought to have been delivered and their value at the time when they are in fact delivered. Horn *v.* Midland Railway Co., L. R. 8 C. P. 131; Cutting *v.* Grand Trunk Railway Co., 13 Allen, 381. Any loss above this difference sustained by the plaintiff, not arising directly from the delay, but collaterally by reason of special circumstances, can be recovered only on the ground that these special circumstances, being in view of both parties to the contract, constituted its basis. Simpson *v.* London & Northwestern Railway Co., 1 Q. B. D. 274. So the loss of a market may be made an element of damages against a carrier for delay in delivery, where it was understood, either expressly or from the circumstances of the case, that the object of delivery was to get the benefit of the market. Pickford *v.* Grand Junction Railway Co., 12 M. & W. 766. In Wilson *v.* Lancashire & Yorkshire Railway Co., 9 C. B. N. S. 632, the plaintiff was held entitled to recover for the deterioration in the marketable value of the cloth by reason

of delay in the delivery, whereby the season for manufacturing it into caps, for which it was intended, was lost.

The same rule, by analogy, has been applied in actions against telegraph companies for delay in the delivery of messages, whereby there has been a loss of a bargain or a market. Such was the case of United States Telegraph Co. *v.* Wenger, 55 Penn. St. 262. There the message ordered a purchase of stock, which advanced in price between the time the message should have arrived and the time when it was purchased under another order, and the advance was held to be the measure of damages. There was an actual loss, because there was an actual purchase at a higher price than the party would have been compelled to pay if the message had been promptly delivered, and the circumstances were such as to constitute notice to the company of the necessity for prompt delivery. The rule was similarly applied in Squire *v.* Western Union Telegraph Co., 98 Mass. 232. There the defendant negligently delayed the delivery of a message accepting an offer to sell certain goods at a certain place for a certain price, whereby the plaintiff lost the bargain, which would have been closed by a prompt delivery of the message. It was held that the plaintiff was entitled to recover, as compensation for his loss, the amount of the difference between the price which he agreed to pay for the merchandise by the message, which if it had been duly delivered would have closed the contract, and the sum which he would have been compelled to pay at the same place in order, by the use of due diligence, to have purchased a like quality and quantity of the same species of merchandise. There the direct consequence and result of the delay in the transmission of the message was the loss of a contract which, if the message had been duly delivered, would by that act have been completed. The loss of the contract was, therefore, the direct result of the defendant's negligence, and the value of that contract consisted in the difference between the contract price and the market price of its subject matter at the time and place when and where it would have been made. The case of True *v.* International Telegraph Co., 60 Maine, 9, cannot be distinguished

in its circumstances from the case in 98 Mass. 232, and was governed in its decision by the same rule. The cases of Manville *v.* Telegraph Co., 37 Iowa, 214, 220, and of Thompson *v.* Telegraph Co., 64 Wisconsin, 531, were instances of the application of the same rule to similar circumstances, the difference being merely that in these the damage consisted in the loss of a sale instead of a purchase of property, which was prevented by the negligence of the defendant in the delivery of the messages. In these cases the plaintiffs were held to be entitled to recover the losses in the market value of the property occasioned, which occurred during the delay.

Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss based upon changes in market value is clearly within the rule for estimating damages. Of this class examples are to be found in the cases of Turner *v.* Hawkeye Telegraph Co., 41 Iowa, 458, and Rittenhouse *v.* Independent Line of Telegraph, 44 N. Y. 263; but these have no application to the circumstances of the present case. Here the plaintiff did not purchase the oil ordered after the date when the message should have been delivered, and therefore was not required to pay, and did not pay, any advance upon the market price prevailing at the date of the order; neither does it appear that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale. If the order had been promptly delivered on the day it was sent, and had been executed on that day, it is not found that he would have resold the next day at the advance, nor that he could have resold at a profit at any subsequent day. The only damage, therefore, for which he is entitled to recover is the cost of transmitting the delayed message.

The judgment is accordingly reversed, and the cause remanded, with directions to enter a judgment for the plaintiff for that sum merely.

WRIGHT *v.* MULVANEY.

Wisconsin, 1890. 78 Wis. 89.

In the year 1888, the plaintiffs were engaged in the business of fishermen, in the waters of Green Bay, and had what is called a pound or pot net set near the direct route from the mouth of Oconto River to Peshtigo Harbor. The defendant, in August, 1888, left the mouth of Oconto River with his steam-tug, and ran through plaintiff's net a few rods from the pot, and injured the same. This action was brought to recover damages for such injuries.[1]

Lyon, J. There is, included in the judgment, $200 for damages to the plaintiffs' business resulting from the injury to their net, — that is to say, for loss of the profits of their business during the time necessarily required to restore the net. The net was never restored, and the plaintiffs' fishing in that vicinity for the remainder of the season was all done with another net located about one half mile south of the injured net. The testimony tends to show that the plaintiffs lifted the pot of their net and took the fish therefrom about every alternate day before the injury; that the profits of each lift were from $40 to $50; and that it would have required about ten days to restore the injured net, had it been restored. There was no other testimony introduced bearing upon the question of profits. Hence the jury necessarily assessed the damages to plaintiffs' business on the basis of four or five lifts of fish, at a profit of from $40 to $50 each.

There was no testimony as to whether the conditions of successful fishing remained for ten days after the injury as favorable as they were immediately before the same, — none to show that the weather continued favorable during the ten days; that storms did not intervene to interrupt the business; that the fish continued to run over the same ground in equal

[1] The statement of facts has been abridged, and part of the opinion omitted.

abundance; that other fishermen operating in the vicinity were equally as successful in their business after as before the injury; nor that the market price of fish remained as high. Without any testimony concerning these essential conditions, the jury must have made their assessment of damages to plaintiffs' business largely upon mere conjectures. They must have assumed without proof that a business proverbially uncertain in results, depending for its success upon numerous conditions which the persons engaged therein cannot control or influence, and the presence or absence of which at a future time cannot be foretold with any degree of accuracy, would have continued after the net was injured to be just as profitable as it was before the injury. Such an assumption under such circumstances is unwarranted in the law, and probably we should be compelled to reverse this judgment for want of sufficient evidence to support the assessment of damages for profits, even though it should be held that under proper proofs the plaintiffs might recover prospective profits.

But we are of the opinion that prospective profits cannot properly be awarded as damages in this case. The reason therefor has already been suggested, which is that under any state of the testimony, in view of the character and conditions of the business, the jury could have no sufficient basis for ascertaining such prospective profits. At best, the assessment thereof must necessarily rest largely upon conjecture. This feature of the case brings it within the rule of Bierbach *v.* Goodyear Rubber Co., 54 Wis. 208, and Anderson *v.* Sloane, 72 Wis. 566, and the cases cited in the opinions therein. In the latter case, Mr. Justice Taylor has pointed out the distinction between that case and those cases in this court in which prospective profits have been allowed as damages. It is unnecessary to repeat the discussion here. It is sometimes quite difficult to determine to which of the above classes a given case belongs, and such determination must be governed largely by the special circumstances of each particular case.

The jury assessed the damages to the net at $110. This

includes not only the cost of repairing it, but also the value of the services of the plaintiffs and their servants in resetting it. We conclude that the plaintiffs are entitled to recover no other damages, except the value of the use of the net during the time they were necessarily deprived of its use, which was about ten days.

By the Court. — The judgment of the Circuit Court is reversed, and the cause will be remanded with directions to award a new trial, or, at the option of the plaintiffs, to give judgment for them for $110 and interest thereon from the date of the verdict, besides costs.

RICHMOND & DANVILLE RAILROAD *v.* ELLIOTT.

United States Supreme Court, 1893. 149 U. S. 266.

Brewer, J.[1] The first question to which our attention is directed arises on the admission of testimony in respect to the probability of plaintiff's promotion in the service of his employer, and a consequent increase of wages. It appears that he was working in the capacity of coupler and switchman for the Central Company, and had been so working for between four and five years; that he was 27 years of age, in good health, and receiving $1.50 per day. He was asked this question: "What were your prospects of advancement, if any, in your employment on the railroad and of obtaining higher wages?" In response to that, and subsequent questions, he stated that he thought that by staying with the company he would be promoted; that in the absence of the yard-master he had sometimes discharged his duties, and also in like manner temporarily filled the place of other employés of the company of a higher grade of service than his own; that there was a "system by which you go in there as coupler or train-hand or in the yard, and if a man falls out you stand a chance of taking his place;" and that the average yard-

[1] Part of the opinion is omitted.

conductor obtained a salary of from sixty to seventy-five dollars a month.

We think there was error in the admission of this testimony. It did not appear that there was any rule on the part of the Central Company for an increase of salary after a certain length of time, or that promotion should follow whenever a vacancy occurred in a higher grade of service. The most that was claimed was that when a vacancy took place a subordinate who had been faithful in his employment, and had served a long while, had a chance of receiving preferment. But that is altogether too problematical and uncertain to be presented to a jury in connection with proof of the wages paid to those in such superior employment. Promotion was purely a matter of speculation, depending not simply upon the occurrence of a vacancy, but upon the judgment or even whim of those in control. Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury in estimating the damages sustained will doubtless always give weight to those general probabilities, as well as those springing from any peculiar capacities or faculties. But that is a different matter from proving to the jury the wages which some superior officer receives, and then exaggerating in the minds of the jury the amount of the damage which has been sustained, by evidence tending to show that there is a chance of plaintiff being promoted at some time to such higher office. It is enough to prove what the plaintiff has been in fact deprived of; to show his physical health and strength before the injury, his condition since, the business he was doing, Wade *v.* Leroy, 20 How. 34; Nebraska City *v.* Campbell, 2 Black, 590; Vicksburg & Meridian Railroad *v.* Putnam, 118 U. S. 545, 554; the wages he was receiving, and perhaps the increase which he would receive by any fixed rule of promotion. Beyond that, it is not right to go and introduce testimony which simply opens the door to a speculation of possibilities.

CHAPTER IX.

COMPENSATION.

SECTION 1. — *Entire Damages.*

FETTER *v.* BEAL.

King's Bench, 1698, 1701. 1 Ld. Raym. 339, 692.

SPECIAL action of trespass and battery for a battery committed by the defendant upon the plaintiff, and breaking his skull. The plaintiff declares of the battery, &c., and that he brought an action for it against the defendant, and recovered £11 and no more; and that after that recovery part of his skull by reason of the said battery came out of his head, *per quod*, &c. The defendant pleaded the said recovery in bar. Upon which the plaintiff demurred. And *Shower* for the plaintiff argued, that this action differed from the nature of the former, and therefore would well lie, notwithstanding the recovery in the other; because the recovery in the former action was only for the bruise and battery, but here there is a maihem by the loss of the skull. As if a man brings an action against another for taking and detaining of goods for two months, and afterwards he brings another action for taking and detaining for two years, the recovery in the former action is not pleadable in bar of the second. If death ensues upon the battery of a servant, this will take away the action *per quod servitium amisit.* And then if a consequence will take away an action, for the same reason it will give an action. If a man brings an action for uncovering his house, by which his goods were spoiled, and afterwards by reason of the said

uncovering new goods are spoiled, he shall have a new action. *Quod Holt negavit.* And *per totam curiam*, the jury in the former action considered the nature of the wound, and gave damages for all the damages that it had done to the plaintiff; and therefore a recovery in the said action is good here. And it is the plaintiff's fault, for if he had not been so hasty, he might have been satisfied for this loss of the skull also. *Judgment for the defendant, nisi, &c.*

Sir *Bartholomew Shower* moved in this case for judgment for the plaintiff, because this special subsequent damage is a sufficient foundation for an action, and that for great reason, because the jury could not have consideration of it in giving damages. And he compared it to the case of a nuisance, that a man might have an action for every new dropping of the water from the eaves of the house. 2. There is a maim laid here, and therefore the prior recovery in the action of assault cannot be a bar. Mr. *Montague*, of the same side, said, that if A. breaks a sea wall, and the owner of the land recovers damages for it in an action, and erects a new wall, and before it is dry and settled the sea throws it down again, and overflows the land, &c., for this special subsequent damage the owner may have a new action.

Holt, C.J. This is a new case to which there is no parallel in the books. Every one shall recover damages in proportion to his prejudice which he hath sustained; and if this matter had been given in evidence, as that which in probability might have been the consequence of the battery, the plaintiff would have recovered damages for it. The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in aggravation of damages. In some cases the damage is the foundation of the action, as in the action by the master for battery of his servant, *per quod servitium amisit*, but here the battery only is the foundation of the action, and this damage, which might probably ensue, might and ought to have been given in evi-

dence, and must be intended to have been given in evidence in the former action, and that the jury gave damages for all the hurt that he suffered; for if the nature of the battery was such as probably to produce this effect, the jury might give damages for it before it happened. As to the case of the sea wall, the plaintiff would recover damages enough in the first action, to rebuild it; and if he rebuilds it ill, the fault is his own. And as to the nuisance, every new dropping is a new nuisance. As to the maihem, that is nothing; for a recovery in battery, &c., is a bar in appeal of maihem, 4 Co. 43 *a*, because in battery the plaintiff may give a maihem in evidence, and recover damages for it. And HOLT, C.J., said, that the original cause was tried before him eight years ago, and the plaintiff and defendant appeared to be both in drink, and the jury did not well know which of them was in fault and therefore they gave the less damages. The plaintiff could not obtain judgment, the court inclining strongly against him.

DARLEY MAIN COLLIERY CO. *v.* MITCHELL.

House of Lords, 1886. 11 App. Cas. 127.

LORD HALSBURY, L.C.[1] My Lords, in this case the plaintiff, the owner of land upon the surface, has sued the lessee of certain seams of coal below and adjacent to the plaintiff's land for having disturbed the plaintiff in the enjoyment of his property by causing it to subside. The defendants before and up to the year 1868 have worked, that is to say, excavated, the seams of coal, of which they were lessees. Their excavation caused a subsidence of the ground, for which they acknowledged their liability and made satisfaction. There were other subsidences after this, and as the case originally came before your Lordships, it was matter of inference only whether these subsidences were or were not in some way connected with, if not forming part of, the original subsidence.

[1] Lords BRAMWELL and FITZGERALD delivered concurring opinions, and Lord BLACKBURN a dissenting opinion.

The parties have now, by an admission at your Lordships' bar, placed the matter beyond doubt.

It has been agreed that the owner of the adjoining land worked out his coal subsequently to 1868. That if he had not done so there would have been no further subsidence, and if the defendants' coal had not been taken out, or if sufficient support had been left, the working of the adjoining owner would have done no harm. Under these circumstances, the question is whether the satisfaction for the past subsidence must be taken to have been equivalent to a satisfaction for all succeeding subsidences. No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and forever. A house that has received a shock may not at once show all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained.

But the words "cause of action" are somewhat ambiguously used in reasoning upon this subject; what the plaintiff has a right to complain of in a Court of Law in this case is the damage to his land, and by *the* damage I mean the damage which had in fact occurred, and if this is all that a plaintiff can complain of, I do not see why he may not recover *toties quoties* fresh damage is inflicted.

Since the decision of this House in Bonomi *v.* Backhouse, 9 H. L. C. 503, it is clear that no action would lie for the excavation. It is not, therefore, a cause of action; that case established that it is the damage and not the excavation which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original

act or omission of the defendants, is not a new cause of action for which damages may be recovered. I cannot concur in the view that there is a breach of duty in the original excavation.

In Rowbotham *v.* Wilson, 8 E. & B. 123, 157, Cresswell, J., said that the owner of the mines might have removed every atom of the minerals without being liable to an action, if the soil above had not fallen; and what is true of the first subsidence seems to me to be necessarily true of every subsequent subsidence. The defendant has originally created a state of things which renders him responsible if damage accrues; if by the hypothesis the cause of action is the damage resulting from the defendant's act, or an omission to alter the state of things he has created, why may not a fresh action be brought? A man keeps a ferocious dog which bites his neighbor; can it be contended that when the bitten man brings his action he must assess damages for all possibility of future bites? A man stores water artificially, as in Fletcher *v.* Rylands, Law Rep. 3 H. L. 330; the water escapes and sweeps away the plaintiff's house; he rebuilds it, and the artificial reservoir continues to leak and sweeps it away again. Cannot the plaintiff recover for the second house, or must he have assessed in his first damages the possibility of any future invasion of water flowing from the same reservoir?

With respect to the authorities, the case of Nicklin *v.* Williams, 10 Ex. 259, was urged by the Attorney-General as an authority upon the question now before your Lordships, by reason of some words attributed to Lord Westbury in Bonomi *v.* Backhouse. If Lord Westbury really did use the words attributed to him, it is, I think, open to doubt in what sense they are to be understood. Baron Parke in that case delivered the judgment against the plaintiffs recovering any subsequently accruing damage, because, he said, the cause of action was the original injury to the right by withdrawing support. That principle is admittedly wrong, and was expressly held to be wrong in Bonomi *v.* Backhouse, since if that had been law there could have been no answer to the plea of the Statute of

Limitations in that case. It is difficult to follow the Master of the Rolls when he says it was not necessary to overrule Nicklin *v.* Williams by that decision. It seems to me to have been the whole point decided in Nicklin *v.* Williams, and how that case so decided can be an authority for anything I am at a loss to understand.

I think the decision of this case must depend as matter of logic upon the decision of your Lordships' House in Bonomi *v.* Backhouse, and I do not know that it is a very legitimate inquiry, when a principle has been laid down by a tribunal from which there is no appeal, and which is bound by its own decisions, whether that principle is upon the whole advantageous or convenient; but if such considerations were permissible, I think Cockburn, C.J., in his judgment in Lamb *v.* Walker, 3 Q. B. D. 389, establishes the balance of convenience to be on the side of the law, as established by Bonomi *v.* Backhouse. I cannot logically distinguish between a first and a second, or a third, or more subsidences, and after Bonomi *v.* Backhouse it is impossible to say that it was wrong in any sense for the defendant to remove the coal. Cresswell, J., has said, and I think rightly, that he might remove every atom of the mineral.

The wrong consists, and, as it appears to me, wholly consists, in causing another man damage, and I think he may recover for that damage as and when it occurs.

For these reasons, I think that the judgment appealed from should be affirmed with costs. *Appeal dismissed.*

STODGHILL *v.* CHICAGO, BURLINGTON, & QUINCY RAILROAD.

Iowa, 1880. 53 Ia. 341.

Christopher Stodghill was the owner of a farm of some four hundred and eighty acres in Wapello County. Part of said farm consisted of a tract of twenty-nine acres of creek or pasture land. The defendant's right of way for its railroad was located along the north line of said tract. The nat-

ural channel of North Avery Creek ran across the right of way upon said tract, meandered through it, and recrossed the north line of the land, and the right of way. When the railroad was constructed, bridges were built across the creek which spanned the channel, and did not obstruct the passage of the water in the stream, nor divert it from where it was wont to flow. In 1874 the defendants cut a channel on the north side of their right of way, and filled in the bridge where the stream entered plaintiff's land, with earth, which diverted the stream into the new channel entirely, except as the water backed through a culvert at the point where the water recrosses the right of way; the said bridge at the last-named point having been previously removed, a culvert there constructed, and the stream filled in at this point, except the culvert aforesaid.

Christopher Stodghill commenced an action against the defendant for damages to his land by reason of the diversion of the stream. He recovered a verdict and judgment for one dollar and costs. The case was affirmed upon appeal to this court. See Stodghill *v.* C. B. & Q. R. Co., 43 Iowa, 26.

Said Stodghill died in the year 1876, and by his last will and testament, which was duly admitted to probate, he devised the said twenty-nine acres with other of his lands to the plaintiff. This action was commenced in February, 1877, to recover damages for continuing to divert the water from the natural channel of said creek, and for a judgment directing the abatement and removal of the embankments in the original channel.

There was a trial by the court without the intervention of a jury, and a judgment was rendered for plaintiffs for one dollar actual damages, and seventy-five dollars exemplary damages, and an order was made requiring the defendant to abate and remove said obstructions from the natural channel of the creek. Defendant appeals.

Rothrock, J. When the earth was deposited in the channel of the creek and raised to a sufficient height to cover over the bridge and make a solid embankment upon which

to lay the railroad track, the water in the creek was at once turned into the new channel. The principal question in the case is whether the judgment for damages in favor of Christopher Stodghill was a full adjudication for all injuries to the land, not only up to the commencement of that suit, but for all that might thereafter arise.

In Powers *v.* Council Bluffs, 45 Iowa, 652, the question being as to what is a permanent nuisance, it was held that where it is of such character that its continuance is necessarily an injury, and that when it is of a permanent character that will continue without change from any cause but human labor, the damage is original, and may be at once fully estimated and compensated; that successive actions will not lie, and that the Statute of Limitations commences to run from the time of the commencement of the injury to the property. That was a case where the plaintiff sought to recover damages against the city for diverting the natural channel of a stream, called Indian Creek, by excavating a ditch in a street in such a manner that it widened and deepened by the action of the water, so as to injure plaintiff's lot abutting upon said street. The same rule was recognized in Town of Troy *v.* Cheshire Railroad Co., 3 Foster (N. H.), 83. In that case the defendant constructed the embankment of its railroad upon a part of a highway. The action was by the town to recover damages. The plaintiff claimed that it was entitled to recover for the damages for the permanent injury. The court said: "The railroad is in its nature, design, and use, a permanent structure, which cannot be assumed to be liable to change; the appropriation of the roadway and materials to the use of the railroad is, therefore, a permanent diversion of that property to that new use, and a permanent dispossession of the town of it as the place on which to maintain a highway. The injury done to the town is, then, a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages."

The case at bar is a much stronger illustration of what is a permanent nuisance or trespass for which damages, past, present, and prospective, may be recovered, than Powers *v.* Council Bluffs. In this case the damages to the whole extent were at once apparent. The water was diverted from the natural channel as soon as the embankment was raised to a sufficient height to turn the current into the new channel. The injury to the land was then as susceptible of estimation as it ever afterwards could be, and without calculating any future contingencies. In the other case, when the water commenced to flow in the new channel the plaintiff's lots were not injured. It required time to wash away the banks and work backward before the injury commenced. It is not necessary to dwell upon this question. The rule established in Powers *v.* Council Bluffs, *supra*, is decisive of this case. See, also, Chicago & Alton R. R. Co. *v.* Maher, Supreme Court of Illinois, Chicago Legal News, July 5, 1879. Counsel for appellee contend that the railroad embankment is not permanent because it is liable to be washed out by freshets in the stream, and cannot stand without being repaired. There is no evidence in this record tending to show that the embankment is insufficient to accomplish the purpose for which it was erected; that is, to make a solid railroad track and divert the water into the new channel. One witness testified that it is from sixteen to eighteen feet high. We will not presume that the defendant was guilty of such a want of engineering skill as not to raise its embankments so that they will not be affected by high water. It seems to us that a railroad embankment, of proper width and raised to the proper height, is about as permanent as anything that human hands can make. Before leaving this branch of the case, it is proper to say that the acts complained of were done within the limit of the defendant's right of way, and the injury, if any, to the plaintiff's land, was consequential. The defendant did not enter upon plaintiff's land to take a right of way for its railroad, and Christopher Stodghill did not bring his action to recover upon that ground. As we have a statute providing

for proceedings to condemn the land necessary to be taken for right of way for railroad purposes, it may be that the mode of ascertaining the damages prescribed by the statute must be pursued. See Daniels *v.* C. & N. W. R. R. Co., 35 Iowa, 129. That question, however, is not in this case, and we only refer to it lest we may be misunderstood.

Christopher Stodghill, in his petition in the former action, averred that the diversion of the stream from its natural course across said land perpetually deprived him of the use thereof, to his great damage in the prosecution of his business, and in the depreciation in the value of his said farm and pasture lands, and he claimed damages in the sum of $499. The court instructed the jury in that case that they were not to consider the question in regard to any permanent damage to the land, for the reason that the plaintiff had the right to institute other suits to recover damages sustained after the commencement of the action.

But the plaintiff claimed damages generally, and by his pleadings he and those holding under him must be bound. Indeed, we do not understand counsel for appellee to contend otherwise. The damages being entire and susceptible of immediate recovery, the plaintiff could not divide his claim and maintain successive actions. The erroneous instructions of the court to the jury did not affect the question. It was the duty of the plaintiff to have excepted and appealed. "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with the subject-matter of litigation." Freeman on Judgments, sec. 249. And see Dewey *v.* Peck, 33 Iowa, 242; Schmidt *v.* Zahensdorf, 30 Iowa, 498.

The foregoing considerations dispose of the case, and it becomes unnecessary to examine or determine other questions discussed by counsel.

Reversed.

PARKER *v.* RUSSELL.

Massachusetts, 1882. 133 Mass. 74.

FIELD, J. In an action for the breach of a contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to the date of the writ, and not up to the time when the verdict is rendered. Fay *v.* Guynon, 131 Mass. 31.

But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he elects so to treat it, the damages are assessed as of a total breach of an entire contract. Amos *v.* Oakley, 131 Mass. 413; Schell *v.* Plumb, 55 N. Y. 592; Remelee *v.* Hall, 31 Vt. 582; Fales *v.* Hemenway, 64 Maine, 373; Sutherland *v.* Wyer, 67 Maine, 64; Lamoreaux *v.* Rolfe, 36 N. H. 33; Mullaly *v.* Austin, 97 Mass. 30; Howard *v.* Daly, 61 N. Y. 362.

Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract they include damages for not performing the contract in the future as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite because the duration of the life of the plaintiff is uncertain, but uncertainty in the duration of a life has not, since the adoption of life tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life.

When the defendant, for example, absolutely refuses to perform such a contract after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready at all times during his life to

be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death.

Daniels v. Newton, 114 Mass. 530, decides that an absolute refusal to perform a contract before the performance is due by the terms of the contract is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future.

The cases cited by the defendant are not inconsistent with these views. In Pierce v. Woodward, 6 Pick. 206, the declaration was for a breach of a negative promise, namely, "not to set up the business of a grocer" within certain limits; and it was held that the damages could be assessed only to the date of the writ. The defendant might at any time, without the consent of the plaintiff, stop carrying on the business, when the plaintiff's damages would necessarily cease.

Powers v. Ware, 4 Pick. 106, was an action of covenant broken, brought by the overseers of the poor, under the St. of 1793, c. 59, § 5, for the breach of a covenant to maintain an apprentice under an indenture of apprenticeship. The court in the opinion speak of the common-law rule in assessing damages only to the date of the writ. But the statute under which the action was brought prevented the overseers from treating the contract as wholly at an end, because it gave the apprentice a right of action when the term is expired, "for damages for the causes aforesaid, other than such, if any, for which damages may have been recovered as aforesaid," that is, by the overseers.

Hambleton v. Veere, 2 Saund. 169, was an action on the case for enticing away an apprentice; and Ward v. Rich,

1 Vent. 103, was an action for abducting a wife; and neither throws much light on the rule of damages for breach of a contract.

Horn *v.* Chandler, 1 Mod. 271, was covenant broken upon an indenture of an infant apprentice, who under the custom of London had bound himself to serve the plaintiff for seven years; the declaration alleged a loss of service for the whole term, a part of which was unexpired; on demurrer to the plea, the declaration was held good, but it was said "that the plaintiff may take damages for the departure only, not the loss of service during the term; and then it will be well enough." But if this be law to-day in actions on indentures of apprenticeship, it must be remembered that they are peculiar contracts, in which the rights and obligations of the parties are often affected by statutory regulations, and in some cases they cannot be avoided or treated as at an end at the will of the parties.

In this case, the declaration alleges in effect a promise to support the plaintiff during his life, from and after receiving the conveyance of certain real estate, an acceptance of such conveyance, and a neglect and refusal to perform the agreement. These are sufficient allegations to enable the plaintiff to recover damages as for a total breach. The court instructed the jury that, "if the defendant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole." We cannot say that this instruction was erroneous as applied to the facts in evidence in the cause, which are not set out.

The jury must have found that the plaintiff did treat the contract as finally broken by the defendant, and the propriety of this finding on the evidence is not before us.

Judgment on the verdict for the larger sum.

JOSEPH SCHLITZ BREWING CO. *v.* COMPTON.

Illinois, 1892. 142 Ill. 511.

ACTION on the case for a nuisance caused by water flowing from defendant's eaves against the wall and into the windows and cellar of plaintiff's adjoining building.[1]

MAGRUDER, J. Proof was introduced of damage done to plaintiff's property after the commencement of the suit by reason of rain-storms then occurring. The defendant asked, and the court refused to give, the following instruction: "The court instructs the jury that the suit now being tried was commenced in the month of April, 1890, and that they are not to take into consideration the question as to whether or not any damage has accrued to plaintiff's property since the commencement of this suit." The question presented is whether plaintiff was entitled to recover only such damages as accrued before and up to the beginning of her suit, leaving subsequent damages to be sued for in subsequent suits, or whether she was entitled to estimate and recover in one action all damages resulting both before and after the commencement of this suit. The rule originally, at common law, was that in personal actions damages could be recovered only up to the time of the commencement of the action. 3 Com. Dig. tit. "Damages," D. The rule subsequently prevailing in such actions is that damages accruing after the commencement of the suit may be recovered, if they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action., Wood's Mayne, Dam. § 103; Birchard *v.* Booth, 4 Wis. 67; Slater *v.* Rink, 18 Ill. 527; Fetter *v.* Beal, 1 Salk. 11; Howell *v.* Goodrich, 69 Ill. 556. In actions of trespass to the realty, it is said that damages may be recovered up to the time of

[1] This short statement is substituted for the statement of facts as it appears in the report.

the verdict (Com. Dig. 363, tit. "Damages," D.), and the reason why, in such cases, all the damages may be recovered in a single action, is that the trespass is the cause of action, and the injury resulting is merely the result of damages. 5 Amer. & Eng. Enc. Law, p. 16, case cited in note 2. But in the case of nuisances or repeated trespasses recovery can ordinarily be had only up to the commencement of the suit, because every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts. McConnel *v.* Kibbe, 29 Ill. 483, and 33 Ill. 175; Railroad Co. *v.* Moffitt, 75 Ill. 524; Railroad Co. *v.* Schaffer, 124 Ill. 112. The cause of action, in case of an ordinary nuisance, is not so much the act of the defendant as the injurious consequences resulting from his act, and hence the cause of action does not arise until such consequences occur; nor can the damages be estimated beyond the date of bringing the first suit. 5 Amer. & Eng. Enc. Law, p. 17, and cases in notes. It has been held, however, that where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit. Id. p. 20, and cases in note.

But there is much confusion among the authorities which attempt to distinguish between cases where successive actions lie and those in which only one action may be brought. This confusion seems to arise from the different views entertained in regard to the circumstances under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury. "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass." Sedg. Dam. (8th ed.) § 94. Some cases hold it to be unreasonable to assume that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrued up to the date of the bringing of the suit.

Other cases take the ground that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury, past and prospective, if such injury be proven with reasonable certainty to be permanent in its character. Id. § 94. We think, upon the whole, that the more correct view is presented in the former class of cases. 1 Suth. Dam. 199–202; 3 Suth. Dam. 369–399; 1 Sedg. Dam. (8th ed.) §§ 91–94; Uline *v.* Railroad Co., 101 N. Y. 98; Duryea *v.* Mayor, 26 Hun, 120; Blunt *v.* McCormick, 3 Denio, 283; Cooke *v.* England, 92 Amer. Dec. 630, notes; Reed *v.* State, 108 N. Y. 407; Hargreaves *v.* Kimberly, 26 W. Va. 787; Ottenot *v.* Railroad Co., 119 N. Y. 603; Cobb *v.* Smith, 38 Wis. 21; Canal Co. *v.* Wright, 21 N. J. Law, 469; Wells *v.* Northampton Co., 151 Mass. 46; Barrick *v.* Schifferdecker, 123 N. Y. 52; Silsby Manuf'g Co. *v.* State, 104 N. Y. 562; Aldworth *v.* City of Lynn, 153 Mass. 53; Town of Troy *v.* Railroad Co., 23 N. H. 83; Cooper *v.* Randall, 59 Ill. 317; Railroad Co. *v.* Hoag, 90 Ill. 339. We do not wish to be understood, however, as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character. In Uline *v.* Railroad Co., *supra*, a railroad company raised the grade of the street in front of plaintiff's lots so as to pour the water therefrom down over the sidewalk into the basement of the houses, flooding the same with water, and rendering them damp, unhealthy, etc., and injuring the rental value, etc. In discussing the question of the damages to which the plaintiff was entitled the court say: "The question, however, still remains, what damages? All her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? . . . There has never been in this State before this case the least doubt expressed in any judicial decision . . . that the plaintiff, in such a case, is entitled to recover only up to the commencement of the action. That such is the rule is as well

settled here as any rule of law can be by repeated and uniform decisions of all the courts, and it is the prevailing doctrine elsewhere." Then follows an exhaustive review of the authorities, which sustain the conclusion of the court as above announced. In Duryea *v.* Mayor, *supra*, the action was brought to recover damages occasioned by the wrongful acts of one who had discharged water and sewerage upon the land of another, and it was held that no recovery could be had for damages occasioned by the discharge of the water and sewage upon the land after the commencement of the action. In Blunt *v.* McCormick, *supra*, the action was brought by a tenant to recover damages against his landlord because of the latter's erection of a building adjoining the demised premises, which shut out the light from the tenant's windows and doors; and it was held that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term. In Hargreaves *v.* Kimberly, *supra*, the action was case to recover damages for causing surface water to flow on plaintiff's lot, and for injury to his trees by the use of coke ovens near said lot, and for injury thereby to his health and comfort; and it was held to be error to permit a witness to answer the following question: "What will be the future damage to the property from the acts of the defendant?" the court saying: "In all those cases where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance, and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage which it may inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time as long as the cause of the injury continues." In Wells *v.* Northampton Co., *supra*, where a railroad company maintained a culvert under its embankment, which impaired land by discharging water on it,

it was held that the case fell within the ordinary rule applicable to continuing nuisances and continuing trespasses. Reference was made to Uline *v.* Railroad Co., *supra*, and the following language was used by the court: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful as against the plaintiff, unless by release or grant by prescription or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner." In Aldworth *v.* City of Lynn, *supra*, where the action was for damages sustained by a landowner through the improper erection and maintenance of a dam and reservoir by the city of Lynn on adjoining land, the Supreme Court of Massachusetts say: "The plaintiff excepted to the ruling that she was entitled to recover damages only to the date of her writ, and contended that the dam and pond were permanent, and that she was entitled to damages for a permanent injury to her property. An erection unlawfully maintained on one's own land, to the detriment of the land of a neighbor, is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit. . . . That it is of a permanent character, or that it has been continued for any length of time less than what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent landowner of his right to recover damages. Nor can the adjacent landowner, in such a case, who sues for damage to his property, compel the defendant to pay damages for the future. The defendant may prefer to change his use of his property so far as to make his conduct lawful. In the present case we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way as to prevent percolation with much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land."

In the case at bar the defendant did not erect the house upon plaintiff's land, but upon its own land. It does not

appear that such change might not be made in the roof, or in the manner of discharging the water from the roof, as to avoid the injury complained of. The first count of the declaration, by its express terms, limits the recovery for damages arising from the negligent and improper construction of defendant's building to such injuries as were inflicted "before the commencement of the suit." The second count was framed in such a way as to authorize a recovery of damages for the flow of water upon plaintiff's premises from some other cause than the wrongful construction of defendant's building; and accordingly plaintiff's evidence tends to show that the eave trough, designed to carry off the water from the roof, was so placed as to fail of the purpose for which it was intended. It cannot be said that the eave trough was a structure of such a permanent character that it might not be changed, nor can it be said that the defendant would not remove the cause of the injury rather than submit to a recovery of entire damages for a permanent injury, or suffer repeated recoveries during the continuance of the injury. The facts in the record tend to show a continuing nuisance, as the same is defined in Aldworth *v.* City of Lynn, *supra*. There is a legal obligation to remove a nuisance; and "the law will not presume the continuance of the wrong, nor allow a license to continue a wrong, or a trespass of title, to result from the recovery of damages for prospective misconduct." 1 Suth. Dam. 199, and notes. The question now under consideration has been before this court in Cooper *v.* Randall, *supra*. The action was for damages to plaintiff's premises, caused by constructing and operating a flouring-mill on a lot near said premises, whereby chaff, dust, dirt, etc., were thrown from the mill into plaintiff's house. It was there held that the trial court committed no error in refusing to permit the plaintiff to prove that the chaff thrown upon his premises by the mill after the suit was commenced had seriously impaired the value of the property, and prevented the renting of the house; and we there said: "When subsequent damages are produced by subsequent acts, then the damages

should be strictly confined to those sustained before suit brought." It is true that the operation of the mill, causing the dust to fly, was the act of the defendant; but it cannot be said that it was not the continuing act of the present appellant to allow the roof or the eave trough to remain in such a condition as to send the water against appellee's house upon the occurrence of a rain-storm. Nor is appellant's house or eave trough any more permanent than was the mill in the Cooper Case. In Railroad Co. *v.* Hoag, *supra*, a railroad company had turned its waste water from a tank upon the premises of the plaintiff, where it spread and froze, and a recovery was allowed for damages suffered after the commencement of the suit; but it there appeared that the ice, which caused the damage, was upon plaintiff's premises before the beginning of the suit, and the damage caused resulted from the melting of the ice after the suit was brought. It was there said: "The injury sustained by appellee between the commencement of the suit and the trial was not from any wrongful act done by appellant during that time, but followed from acts done before the suit was commenced." Here the water, which caused the injury, was not upon plaintiff's premises, either in a congealed or liquid state, before the beginning of the suit, but flowed thereon as the result of rain-storms which occurred after the suit was commenced. We think the correct rule upon this subject is stated as follows: "If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention it was built; and damages can therefore be recovered only to the date of the action." 1 Sedg. Dam. (8th ed.) § 93. It follows from the foregoing observations that it was error to allow the plaintiff to introduce proof of damage to her property caused by rain-storms occurring after the commencement of her suit, and that the instruction asked by the defendant upon that subject, as the same is above set forth, should have been given. The judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the Circuit Court.

Section 2. — *Reduction; Benefits.*

HOPPLE *v.* HIGBEE.

New Jersey, 1852. 3 Zab. 342.

Green, C. J. In the action of trespass *de bonis asportatis* damages are allowed upon two grounds, viz.: 1. By way of compensation for the loss of the goods. 2. As vindictive or exemplary damages for a wanton or malicious injury to the rights or feelings of the plaintiff, as a public example to prevent a repetition of the act. Where the trespass is accompanied by no circumstances of aggravation, the value of the property to the plaintiff at the time of the injury, with interest, furnishes ordinarily the measure of damages. Pacific Ins. Co. *v.* Conrad, Bald. 138; Sedgwick on Damages, 549.

Where there are no circumstances of aggravation where vindictive or exemplary damages are not claimed, the measure of damages is compensation to the plaintiff for his loss. And hence, when the goods taken by the trespasser are restored to the plaintiff and accepted by him, that fact may be shown in mitigation of damages. It will not, indeed, justify the tort nor absolve the tort-feasor from the legal consequences of his wrongful act; but it will show that the plaintiff has sustained less injury, and is consequently entitled to less damages by way of compensation than he otherwise would have been. 2 Rolle's Ab. 569, pl. 3; Com. Dig. "Trespass" B 4; Bac. Ab. "Trespass" E 2.

So if the property, while in the hands of the trespasser, be attached or taken in execution upon process issued at the suit of a third party against the owner of the goods, and they be thus applied by sanction of law in satisfaction of the owner's debt, or otherwise for his benefit, that fact, the cases agree, may be shown in mitigation of damages. Higgins *v.* Whitney, 24 Wend. 379; Squire *v.* Hollenbeck, 9 Pick. 551; Sherry *v.* Schuyler, 2 Hill, 204; Irish *v.* Cloyes, 8 Vt. 30.

But it is said, that although if taken out of the hands of the wrongdoer by legal process at the instance of a third party, that fact may be shown in mitigation of damages; the rule does not apply where the process is sued out by the trespasser himself, because the trespasser cannot mitigate damages by showing that he had himself applied the property to the owner's use without his consent. Hanmer *v.* Wilsey, 17 Wend. 91; Otis *v.* Jones, 21 Wend. 394; Higgins *v.* Whitney, 24 Wend. 379.

So far as the question of compensation to the plaintiff is concerned, it is obviously immaterial whether the goods are taken from the wrongdoer by process, sued out by the wrongdoer himself or by a third party. In either event they are applied to the plaintiff's use, and his loss, by reason of the trespass, is diminished as much in the one case as in the other. Upon the mere question of compensation, the distinction sought to be established is without foundation. If the distinction exist, it must rest upon principles of policy or upon some ground distinct from the mere right of the plaintiff to compensation for his loss.

And it was accordingly held by the Supreme Court of New York that the evidence was inadmissible, because the trespasser cannot by any act of his own, without the plaintiff's consent, relieve himself from the consequence of his tort, or deprive the plaintiff of redress for the injury inflicted. It is true that the trespasser cannot by his own mere act either restore the property to the plaintiff, or apply it to his use, without his consent. Nor can the trespasser appropriate the property wrongfully seized either to pay a debt due to himself or to any other creditor, except by consent of the debtor or by sanction of law. But where the goods are seized in the hands of the trespasser by legal process, and applied to the payment of the debts of the owner, they are not so applied by the act of the tort-feasor, but by act and operation of law. And, upon principle, it is perfectly immaterial whether the machinery of law be set in operation by a third party or by the tort-feasor himself. In either event the property of the

plaintiff, unlawfully taken from his possession, is by sanction of law taken from the trespasser, and applied to the use of the owner. As a matter of right and justice, therefore, he is entitled to so much less damages as a compensation for his injury.

It is clear, moreover, that the ownership of the goods is unchanged by the tort. They remain in the hands of the trespasser liable to be seized by legal process against the owner, and thus appropriated to his use. Any creditor may thus sue out process, seize and appropriate them. It cannot be contended that the trespasser has forfeited his rights as a creditor, or that he has not the same right to sue and attach the goods as any other creditor has. And if the goods may thus be legally taken from the defendant's possession, and applied to the plaintiff's use, it is difficult to conceive of any rule of law or principle of justice which would compel the trespasser to respond for the value of the goods, or permit the plaintiff to recover their full value, by way of compensation.

In the case now under consideration, the goods were originally seized by virtue of an attachment issued by a justice for an amount beyond his jurisdiction. The process was consequently void, and the plaintiff in the attachment and the officer who served the process became liable as trespassers. It cannot be denied that the plaintiff had a right to sue out a second and valid attachment, and that it was not only the right, but the duty of the officer to attach the same goods to answer the claim of the plaintiff. And if, by operation and judgment of law, the goods were applied to the plaintiff's use, his damages resulting from the unlawful act were *pro tanto* diminished, and it would seem to be perfectly immaterial, so far as the question of damages resulting from the trespass is concerned, whether the attachment was sued out by A. or by B., or whether the property was applied to pay a debt of the plaintiff or of any of the creditors who came in under the attachment.

The force of the objection consists in the position, that the

act of the wrongdoer, after the trespass has been committed, and the right of the plaintiff to redress is consummate, cannot divest the plaintiff of any part of his remedy. It is not contended that it can purge the tort, but merely that it may qualify the injury which the plaintiff has received.

There are numerous authorities which, by analogy, sustain the position.

Thus, in an action by an executor against an executor *de son tort*, the defendant may show in mitigation of damages the due payment of the debts of the decedent. Whitehall *v.* Squire, Carth. 104; 2 Saund. P. and E. 888; Buller's N. P. 48.

He cannot plead in justification payment of the debts to the value of the goods; but, upon the general issue, those payments shall be recognized in damages. 2 Phil. Ev. 125.

In Prescott *v.* Wright, 6 Mass. 20, which was an action of trover by a defendant in execution against a constable who levied the execution after it was returnable, the court held that the levy was without legal authority and a conversion. "But," say the court, "as the defendant paid a debt due from the plaintiff out of the proceeds, this fact may mitigate the damages." The same principle was adopted in Caldwell *v.* Eaton, 5 Mass. 404.

In Pierce *v.* Benjamin, 14 Pick. 356, the plaintiff sued in trover for goods taken and sold by a tax collector under a tax warrant. The goods were sold in violation of law, and the proceeds applied in part payment of the plaintiff's tax. It was held that the defendant, by virtue of his unlawful proceedings, became liable as a trespasser *ab initio*, but that the amount of the proceeds of the sale applied toward the payment of the plaintiff's tax must be deducted from the value of the goods in ascertaining the amount of damages.

The court say, "The general rule of damages in actions of trover is unquestionably the value of the property taken at the time of its conversion. But there are exceptions and qualifications of this rule, as plain and well established as the rule itself. Whenever the property is returned, and received

by the plaintiff, the rule does not apply; and when the property itself has been sold, and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, the reason of the rule ceases, and justice forbids its application. In all such cases the facts may be shown in mitigation of damages." Accord Blake *v.* Johnson, 1 N. H. 91.

Judge Greenleaf, one of the most accurate of elementary writers, lays down the rule with equal clearness: "If the property, in whole or in part, has been applied to the payment of the plaintiff's debt, or otherwise to his use, this may be considered by the jury as diminishing the injury, and consequently the damages." 2 Greenl. Ev. § 276.

The rule, it may be admitted, is too broadly stated. The unauthorized appropriation by a trespasser of the goods wrongfully taken to pay the owner's debts, it may be, would be inadmissible in evidence in mitigation of damages. But if the goods wrongfully taken be thus appropriated, either by the consent of the owner or by sanction and operation of law, there would seem to be no just ground for questioning the soundness of the principle. In Lamb *v.* Day and Peck, 8 Vt. 407, the plaintiff brought an action of trespass against the attaching officer and the plaintiff in attachment for unlawfully using a horse, the property attached. The plaintiff in attachment subsequently recovered judgment, and the horse was sold, by virtue of an execution, in satisfaction of the judgment. The defendants were held trespassers *ab initio* by reason of the unlawful use of the horse. But the court said, "placing the liability of the defendants on the footing of the original taking as an act of trespass, still the ultimate disposition of the horse is material to the question of damages; and as the property was applied in satisfaction of the plaintiff's debt, that circumstance serves to reduce the damages accordingly."

In Stewart *v.* Martin, 16 Vt. 397, the constable, having seized property by virtue of mesne process of attachment out of his jurisdiction, was sued in trespass for such taking. It was held that the defendant might show, in mitigation of

damages, that, having taken the property to a place within his jurisdiction, he attached it there, on the same process as the property of the same debtor, after the action of trespass had been commenced against him. The same rule was adopted in Board *v.* Head, 3 Dana's Rep. 489, 494.

So in Briggins *v.* Grove, Cromp. & J. 36, it was held that where a distress was taken and sold unlawfully without previous appraisement, the party distrained on can only recover the value of the goods distrained less the amount of rent due, though he may recover special damages for the illegal sale.

It is true it was held in Sowell *v.* Champion, 6 Ad. & El. 407, that where goods are seized under process upon a regular judgment in a place to which the process did not run, the plaintiff might recover the whole value of the goods, and not the mere damages sustained by their being taken in a wrong place. In delivering the opinion, Denman, C.J., says, "parties are not to extort what is justly due by the improper execution of a warrant." That may well be. But it must be borne in mind that exemplary or vindictive damages may in all proper cases be given for a trespass committed under color of legal process. And whenever a plaintiff, or the officer serving process, shall wantonly or injuriously attach or take in execution the property of the defendant without lawful authority, a jury may repress the evil and redress the injury by awarding exemplary damages. But it is not perceived that a regard either for public justice or the rights of individuals can require that a plaintiff who sues out process in good faith which proves to be void, or the officer who executes such process, shall be thereby estopped from suing out or executing valid process upon the property thus wrongfully taken, or that the party injured shall be thereby entitled to recover the full value of the property in damages, although they were lawfully appropriated in satisfaction of his own debt.

If the evidence be competent by way of mitigating damages, it is clearly admissible under the general issue. It could not be specially pleaded. Pleas in bar are in discharge

of the action, and every plea must be pleaded to the action. A plea to the damages merely is vicious. Matters in mitigation, therefore, cannot be pleaded, and can only be given in evidence under the general issue. 2 Greenl. § 625; 1 Chit. Pl. (7th ed.) 539, 541; Demick *v.* Chapman, 11 Johns. 132.

The judgment must be reversed, and a *venire de novo* awarded.

TORRY *v.* BLACK.

New York, 1874. 58 N. Y. 185.

This was an action of trespass for cutting and carrying away wood and timber from plaintiff's lands.

In 1851 the father of the plaintiff died intestate, leaving a large real estate. He left surviving him a widow and the plaintiff, who was his only heir, then about one year old. The defendant was the grandfather of the plaintiff, and he took out letters of administration on the estate of plaintiff's father. The grandfather, after taking out letters of administration, and between the years 1851 and 1866, cut and carried away a large quantity of timber growing on the land that descended to the plaintiff. The plaintiff, on attaining his majority, brought this action to recover damages for such unlawful cutting and carrying away.

The defence set up in the answer is, that the timber was cut with the consent and approval of plaintiff's mother, who was his guardian and entitled to dower in said premises, and that he afterward settled with her for the said timber and was released by her from all claims therefor.[1]

Grover, J. We have seen that the defendant was liable as a trespasser for cutting the timber. A trespasser cannot mitigate the damages by an offer to return the property to its owner; but if the owner accept the property, or otherwise regain possession of it, it may be proved for that purpose, as in that case he is not deprived of his property. The inquiry is, what is the amount of damage sustained by the

[1] Part of the case is omitted.

plaintiff from the wrongful act of the defendant. But to warrant this evidence the property must be received by the plaintiff or applied to his use with his assent. The law will not permit a wrong-doer to take the property of another and apply the same to his use without his assent; and, if so applied, the damages recoverable for the injury will not be thereby affected. When the owner voluntarily receives the proceeds of the property wrongfully taken, or directs or assents to their application to his use, such facts may be shown in mitigation, the same as the receipt or application of the identical property taken by the trespasser. The fact that the defendant was administrator of the estate of the plaintiff's father is wholly immaterial in this action, as he had nothing in that character to do with his real estate, unless it became necessary to sell or mortgage it for the payment of the debts of the intestate.

The further facts, that the defendant was the father of the plaintiff's mother, and that she was at the time of the death of his father under twenty-one years of age, can have no effect upon the legal rights of the parties. We have seen that, had the plaintiff been capable of contracting for himself and had received from the defendant the proceeds of the timber, or the same had been, with his assent, applied to his use, these facts might have been shown in mitigation of damages. But the plaintiff was not so capable. His mother was, before her appointment as his guardian by the surrogate, guardian for him, by statute, with the powers of a guardian in socage (1 R. S. 718, § 5); as such she was authorized to recover damages for, or reclaim and dispose of timber wrongfully cut upon his land. She had the right to receive for his benefit the proceeds of any timber so cut. It would follow that if she so received such proceeds, or directed or assented to the application thereof to his benefit or that of his estate, the facts may be proved in mitigation of damages. The assent of the guardian, under the circumstances, has the same effect as that of the plaintiff would have had had he been *sui juris*.

JEWETT *v.* WHITNEY.

Maine, 1857. 43 Me. 242.

This action is trespass *quare clausum.*[1] The plaintiff for some time prior to July, 1834, had been in possession of the mill, which is the property in dispute, taking one half of the profits of the same, at which time the defendant took possession of plaintiff's part, and received his proportion of the earnings. The mill was soon torn down and rebuilt by defendant and his co-tenants, using so much of the old as was proper for the new mill. Whereupon this action is brought for expelling the plaintiff, tearing down the mill, converting the same, etc.

May, J. The proof shows that the mill, standing on the premises at the time when the defendant took possession, in July, 1854, had become nearly worthless. It was so rotten that it could not be repaired, and the witness, Lebroke, testifies that it was almost impossible to use it. In its then condition the profits of it could not have exceeded the cost of the repairs. Under these circumstances the defendant co-operated with the co-tenants of the plaintiff in tearing down the old mill and erecting, at an expense of more than two thousand dollars, a new one in its stead. So far as the materials obtained from the old mill were of value, and would answer, they were put into the new. While the plaintiff may, possibly, have lost some immediate profits, before the date of his writ, by his expulsion from the mill, he has largely gained in the increased value of his estate. His damages, therefore, can be only nominal.

Judgment for the plaintiff for one dollar.

[1] Only so much of the case as relates to the question of damages is given.

MAYO *v.* SPRINGFIELD.

Massachusetts, 1884. 138 Mass. 70.

FIELD, J. The gist of the plaintiff's action is the breaking and entering of his close. The other averments of the declaration only affect the damages. Manners *v.* Haverhill, 135 Mass. 165.

The measure of damages is the injury to the plaintiff's estate caused by the trespass; and when, as in this case, the damages are occasioned by placing upon the land "a large quantity of earth," the damages are not necessarily what it would cost the plaintiff to remove the earth from the land. Holt *v.* Sargent, 15 Gray, 97. In determining the extent of the injury to the plaintiff's land, the court had a right to consider the benefits, if any, arising from placing the earth upon the land. An allowance for such benefits is not in the nature of recoupment or set-off, but a method of determining the actual damages sustained. Luther *v.* Winnisimmet Co., 9 Cush. 171; Howes *v.* Grush, 131 Mass. 207; Jones *v.* Gooday. 8 M. & W. 146.

Upon the facts found by the assessor, the court was warranted in entering judgment for the smaller sum.

Judgment affirmed.

PERROTT *v.* SHEARER.

Michigan, 1868. 17 Mich. 48.

COOLEY, C.J.[1] The plaintiff in error, as sheriff of the county of Bay, by virtue of a writ of attachment against the goods and chattels of Henry H. Swinscoe, levied upon a stock of goods which Shearer claimed as assignee of the firm of Swinscoe & Son, composed of said Henry H. Swinscoe and George E. Swinscoe. . . .

[1] Part of the opinion is omitted.

The principal question in the case springs from the fact that the goods, while under the control of the defendant, in pursuance, as the plaintiff claimed, of said attachment levy, were accidentally destroyed by fire. The plaintiff, it appears, held, at the time, insurance policies upon them to their full value, and, after the fire, presented to the insurance companies proofs of the loss, and received pay therefor. Upon this state of facts it was claimed by defendant, that plaintiff's position was the same as if he had repossesed himself of the goods by replevin; and that he was entitled to recover damages only for their detention up to the time of the fire. The Circuit Judge held differently, and instructed the jury that the plaintiff was entitled to recover the full value of the goods, and he had judgment for the value accordingly.

It certainly strikes one, at first, as somewhat anomalous, that a party should be in position to legally recover of two different parties the full value of goods which he has lost; but we think the law warrants it in the present case, and that the defendant suffers no wrong by it. He is found to be a wrong-doer in seizing the goods, and he cannot relieve himself from responsibility to account for their full value except by restoring them. He has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased nor diminished by the fact that such a contract exists. He has no equities as against the plaintiff which can entitle him, under any circumstances, to an assignment of the plaintiff's policies of insurance. The accidental destruction of the goods in his hands was one of the risks he run when the trespass was committed, and we do not see how the law can relieve him from the consequences. If the owner, under such circumstances, keeps his interest insured, he cannot be held to pay the money expended for that purpose for the interest of the trespasser. He already has a right of action for the full value of the goods, and he does not give that away by taking a contract of insurance. For the latter he pays an equivalent in the premium, and is, therefore, entitled

to the benefit of it, if any benefit shall result. The trespasser pays nothing for it, and is, therefore, justly entitled to no return. The case, we think, is within the principle of Merrick *v.* Brainard, 38 Barb. 574, which appears to us to have been correctly decided. The plaintiff recovers of the defendant for the wrong that has been done him in taking his goods; and he recovers of the insurance company a large sum for a small outlay, because such payment was the risk they assumed, and for which they were fairly compensated. It is not a question of importance in this inquiry, whether the act of the defendant caused the loss or not: his equitable claim to a reduction of damages, if he could have any, would spring from the fact that the plaintiff recovers pay for his property twice; but the answer to this is, that he recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities.

We discover no error in the record, and the judgment must be affirmed, with costs.

BROSNAN *v.* SWEETSER.

Indiana, 1891. 127 Ind. 1.

Olds, C.J.[1] This is an action by the appellee against the appellants for damages resulting from injuries sustained by the appellee in falling through a trap-door in the store-room of appellants.

It is contended that the court erred in permitting Drs. Garver and Hodges to testify as to the value of the services of the nurses who took care of the appellee while disabled by reason of the injury. Our attention is not called to any evidence showing such a state of facts as would even preclude the nurses in this case from recovering the value of their services from the appellee;[2] but if such facts did exist, and

[1] Part of the opinion is omitted.

[2] The nurses in this case appear to have been the brother and the sister of the appellee.

the question was properly presented, the evidence was competent. One element of damage is the reasonable value of properly nursing and caring for the injured person. If this be done by some good friend or member of the family who donate their services, that is the good fortune of the appellee, and a matter with which the persons liable have no concern. If she had paid ten times the true value of such services, she could only have recovered what such services were reasonably worth. Her contract or liability has nothing to do with the liability of the appellants. If they are liable for damages on account of the injuries, they are liable for the reasonable value of the necessary services of a nurse, the same as the services of a physician or surgeon. Pennsylvania Co. *v.* Marion, 104 Ind. 239; Summers *v.* Tarney, 123 Ind. 560.

Judgment affirmed.[1]

ELMER *v.* FESSENDEN.

Massachusetts, 1891. 154 Mass. 427.

Tort against a physician for slander in falsely telling workmen of the plaintiff, who was a silk manufacturer, that there was arsenic in the silk furnished by him to them to work with, and thereby causing them to leave his employment.[2]

Holmes, J. The plaintiff claimed, as part of his damages, trouble which he was put to necessarily, in order to determine whether there was arsenic in his silk; and to protect his employees. He estimated the amount at $5.24 per day, and the

[1] "Nor did the court commit any error in refusing to allow her to recover for moneys paid out or incurred by her brother in her behalf for medical attendance and medicines in consequence of such injury. It may be that the physician so in attendance and the person so furnishing the medicines, respectively, might have recovered therefor, as for necessaries; but those things gave her no right of action for moneys voluntarily paid and liabilities voluntarily incurred by her brother or her father. Taylor *v.* Hill, 86 Wis. 105." Cassoday, J., in Peppercorn *v.* Black River Falls, 61 N. W. 79 (Wis. 1894).

[2] Part of the case is omitted.

jury allowed him for eight days at that rate. No exception was taken to the ruling allowing a recovery for this item, but instructions were excepted to which allowed the plaintiff to recover irrespective of the state of things between himself and a company in whose general employ he was, and to which he was accountable for the time spent as stated. That company had told the plaintiff that they should make no deduction from his salary because of the lost time. This ruling was correct. The plaintiff does not recover because he was compelled to break his contract with the company, but for his own time and trouble, irrespective of his contracts. His cause of action for that could not be affected if a stranger saw fit to pay him for the same time, either by way of gift or upon consideration.

Exceptions overruled.

SECTION 3. — *Damages to Owner of Limited Interest.*

ARMORY *v.* DELAMIRIE.

Middlesex Assizes, *coram* PRATT, C. J., 1722. 1 Stra. 505.

THE plaintiff being a chimney-sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled: —

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a

credit to his apprentice, and is answerable for his neglect. Jones *v.* Hart, Salk. 441, Cor. Holt, C.J.; Mead *v.* Hamond; Grammer *v.* Nixon, 1 Stra. 653.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

CLARIDGE *v.* SOUTH STAFFORDSHIRE TRAMWAY.

Queen's Bench Division, 1892. [1892] 1 Q. B. 422.

HAWKINS, J.[1] I am of opinion that this appeal must be dismissed. The appeal is with reference to the measure of the damages recoverable by the plaintiff for an injury to a horse and carriage caused by the negligence of the defendants. The carriage was the property of the plaintiff; the horse was only in the possession of the plaintiff as bailee. The judge entered judgment for the plaintiff for the damage to the carriage, but held that he could not recover for the injury to the horse. The question is whether he was right in so holding. Now, it seems perfectly clear that the plaintiff was under no liability to his bailor for the damage to the horse, for he was not an insurer and he had not been guilty of any negligence. But it has been contended that, notwithstanding that he was under no such liability, he is nevertheless entitled to recover the amount of the depreciation because he was in possession of the horse at the time of the accident, though it is admitted that having recovered such damages he would hold them as trustee for the bailor. I cannot accede to that view. It is true that if a man is in

[1] WILLS, J., delivered a concurring opinion.

possession of a chattel, and his possession is interfered with, he may maintain an action, but only for the injury sustained by himself. The right to bring an action against the wrongdoer is one thing; the measure of the damages recoverable in such action is another. And here the plaintiff has suffered no loss at all. It was contended that though either the bailee or the bailor might sue, only one action could be brought, and that if the bailee recovered first the bailor's right of action was barred, and the remedy of the bailor in such case was against his bailee as for money had and received to his use. I do not agree with that contention. If both the bailee and the bailor have suffered damage by the wrongful act of a third party, I think that each may bring a separate action for the loss sustained by himself. I cannot understand why a bailee should be allowed to recover damages beyond the extent of his own loss simply because he happened to be in possession.

Appeal dismissed; leave to appeal refused.

BREWSTER *v.* WARNER.

Massachusetts, 1883. 136 Mass. 57.

Holmes, J. The modern cases follow the ancient rule, that a bailee can recover against a stranger for taking chattels from his possession. Shaw *v.* Kaler, 106 Mass. 448; Swire *v.* Leach, 18 C. B. (N. S.) 479. See Year Book 48 Edw. III. 20, pl. 8; 20 Hen. VII. 5, pl. 15; 2 Roll. Abr. 569, Trespass, P. pl. 5; Nicolls *v.* Bastard, 2 Cr., M. & R. 659, 660. And as the bailee is no longer answerable to his bailor for the loss of goods without his fault, his right to recover must stand upon his possession, in these days at least, if it has not always done so. But possession is as much protected against one form of trespass as another, and will support an action for damage to property, as well as one for wrongfully taking or destroying it. No distinction has been

recognized by the decisions. Rooth *v.* Wilson, 1 B. & Ald. 59; Croft *v.* Alison, 4 B. & Ald. 590; Johnson *v.* Holyoke, 105 Mass. 80. The ruling requested was obviously wrong, as it denied all right of action to the plaintiff, and was not confined to the *quantum* of damages.

Even if the question before us were whether the plaintiff could recover full damages, his right to do so could not be denied as matter of law. A distinction might have been attempted, to be sure, under the early common law. For, although the bailee's right was undoubted to recover full damages for goods wrongfully taken from him, this was always accounted for by his equally undoubted responsibility for their loss to his bailor, and there is no satisfactory evidence of any such strict responsibility for damage to goods which the bailee was able to return in specie.

But if this reasoning would ever have been correct, which is not clear, it can no longer apply when the responsibility of bailees is the same for damage to goods as for their loss, and when the ground of their recovery for either is simply their possession. Any principle that permits a bailee to recover full damages in the one case, must give him the same right in the other. But full damages have been allowed for taking goods, in many modern cases, although the former responsibility over for the goods has disappeared, and has been converted by misinterpretation into the now established responsibility for the proceeds of the action beyond the amount of the bailee's interest. Lyle *v.* Barker, 5 Binn. 457; 7 Cowen, 681, n. (*a*); White *v.* Webb, 15 Conn. 302; Ullman *v.* Barnard, 7 Gray, 554; Adams *v.* O'Connor, 100 Mass. 515, 518; Swire *v.* Leach, 18 C. B. (N. S.) 492. The latter doctrine has been extended to insurance by bailees. De Forest *v.* Fulton Ins. Co., 1 Hall, 84, 91, 110, 116, 132; Crompton, J., in Waters *v.* Monarch Ins. Co., 25 L. J. (N. S.) Q. B. 102, 106.

If the bailee's responsibility over in this modern form is not sufficient to make it safe in all cases to recognize his right to recover full damages, even where it was formerly

undoubted, at least it applies as well to recoveries for harm done to property as it does to those for taking. Rindge *v.* Coleraine, 11 Gray, 157, 162. And if full damages are ever to be allowed, as it is settled that they may be, they should be recovered in the present case, where the plaintiff appears to have made himself debtor for the necessary repairs with the bailor's assent. Johnson *v.* Holyoke, *ubi supra*. It is not necessary to consider what steps might be taken if the bailor should seek to intervene to protect his interest.

Exceptions overruled.

JOHNSON *v.* STEAR.

Common Pleas, 1863. 15 C. B. (N. S.) 330.

ERLE, C.J., now delivered the judgment of the majority of the court.

In trover by the assignee under the bankruptcy of one Cumming, the facts were that Cumming had deposited brandy lying in a dock with one Stear, by delivering to him the dock-warrant, and had agreed that Stear might sell, if the loan was not repaid on the 29th of January; that, on the 28th of January, Stear sold the brandy, and on the 29th handed over the dock-warrant to the vendees, who on the 30th took actual possession.

Upon these facts, the questions are, — first, was there a conversion? and, if yes, — secondly, what is the measure of damages?

To the first question our answer is in the affirmative. The wrongful sale on the 28th, followed on the 29th by the delivery of the dock-warrant in pursuance thereof, was, we think, a conversion. The defendant wrongfully assumed to be owner in selling; and although the sale alone might not be a conversion, yet, by delivering over the dock-warrant to the vendees in pursuance of such sale, he interfered with the right which Cumming had of taking possession on the 29th

if he repaid the loan; for which purpose the dock-warrant would have been an important instrument. We decide for the plaintiff on this ground; and it is not necessary to consider the other grounds on which he relied to prove a conversion. Then the second question arises.

The plaintiff contends that he is entitled to the full value of the goods sold by the defendant, without any deduction, on the ground that the interest of the defendant as bailee ceased when he made a wrongful sale, and that therefore he became liable to all the damages which a mere wrong-doer who had wilfully appropriated to himself the property of another without any right ought to pay. But we are of opinion that the plaintiff is not entitled to the full value of the goods. The deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under that contract.

It is clear that the actual damage was merely nominal. The defendant by mistake delivered over the dock-warrant a few hours only before the sale and delivery by him would have been lawful; and by such premature delivery the plaintiff did not lose anything, as the bankrupt had no intention to redeem the pledge by paying the loan.

If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more; and that would be a nominal sum only. The plaintiff's action here is in name for the wrongful conversion; but, in substance, it is the same cause of action; and the change of the form of pleading ought not in reason to affect the amount of compensation to be paid.

There is authority for holding, that, in measuring the damages to be paid to the pawnor by the pawnee for a wrongful conversion of the pledge, the interest of the pawnee in the

pledge ought to be taken into the account. On this principle the damages were measured in Chinery *v.* Viall, 5 Hurlst. & N. 288. There, the defendant had sold sheep to the plaintiff; and, because there was delay in the payment of the price by the plaintiff, the defendant resold the sheep. For this wrong the court held that trover lay, and that the plaintiff was entitled to recover damages; but that, in measuring the amount of those damages, although the plaintiff was entitled to be indemnified against any loss he had really sustained by the resale, yet the defendant as an unpaid vendor had an interest in the sheep against the vendee under the contract of sale, and might deduct the price due to himself from the plaintiff from the value of the sheep at the time of the conversion.

In Story on Bailments, § 315, it is said: "If the pawnor, in consequence of any default or conversion by the pawnee, has recovered back the pawn or its value, still the debt remains and is recoverable, unless in such prior action it has been deducted: and it seems that, by the common law, the pawnee in such action for the value has a right to have the amount of his debt recouped in damages." For this he cites Jarvis *v.* Rogers, 15 Mass. R. 389. The principle is also exemplified in Brierly *v.* Kendall, 17 Q. B. 937. There, although the form of the security was a mortgage and not a pledge, and although the action was trespass and not trover, yet the substance of the transaction was in close analogy with the present case. There was a loan by the defendant to the plaintiff, secured by a bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods till he should make default in some payment. Before any default, the defendant took the goods from the plaintiff, and sold them. For this wrong he was liable in trespass; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods un-

der the bill of sale; and such interest was to be considered in measuring the extent of the plaintiff's right to damages.

On these authorities we hold that the damages due to the plaintiff for the wrongful conversion of the pledge by the defendant, are to be measured by the loss he has really sustained; and that, in measuring those damages, the interest of the defendant in the pledge at the time of the conversion is to be taken into the account. It follows that the amount is merely nominal, and therefore that the verdict for the plaintiff should stand, with damages 40*s*.

Williams, J.[1] I agree with the rest of the court that there was sufficient proof of a conversion; but I cannot agree with my Lord and my learned brothers as to the other point, for I think the damages ought to stand for the full value of the brandies. The general rule is indisputable, that the measure of damages in trover is the value of the property at the time of the conversion. To this rule there are admitted exceptions. There is the well-known case of a redelivery of the goods before action brought, which, though it cannot cure the conversion, yet will go in mitigation of damages. Another exception is to be found in cases where the plaintiff has only a partial interest in the thing converted. Thus, if one of several joint-tenants or tenants in common alone brings an action against a stranger, he can recover only the value of his share. So, if the plaintiff, though solely entitled to the possession of the thing converted, is entitled to an interest limited in duration, he can only recover damages proportionate to such limited interest, in an action against the person entitled to the residue of the property (though he may recover the full value in an action against a stranger). The case of Brierly *v.* Kendall, which my Lord has cited, is an example of this exception. There, the goods had been assigned by the plaintiff to the defendant by a deed the terms of which operated as a re-demise, and, since the defendant's *quasi* estate in remainder was not destroyed or forfeited by his conversion of the *quasi* particular estate, the

[1] Part of this opinion is omitted.

plaintiff, as owner of that estate, was only entitled to recover damages in proportion to the value of it.

With respect, however, to liens, the rule, I apprehend, is well established, that, if a man having a lien on goods abuses it by wrongfully parting with them, the lien is annihilated, and the owner's right to possession revives, and he may recover their value in damages in an action of trover. With reference to this doctrine, it may be useful to refer to Story on Bailments. In § 325, that writer says: "The doctrine of the common law now established in England, after some diversity of opinion, is, that a factor having a lien on goods for advances or for a general balance, has no right to pledge the goods, and that, if he does pledge them, he conveys no title to the pledgee. The effect of this doctrine is, in England, to deny to the pledgee any right in such a case to retain the goods even for the advances or balance due to the factor. In short, the transfer is deemed wholly tortious; so that the principal may sue for and recover the pledge, without making any allowance or deduction whatever for the debts due by him to the factor." After stating that the English legislature had at length interfered, the learned author continues in § 326: "In America, the general doctrine that a factor cannot pledge the goods of his principal, has been repeatedly recognized. But it does not appear as yet to have been carried to the extent of declaring the pledge altogether a tortious proceeding, so that the title is not good in the pledgee even to the extent of the lien of the factor, or so that the principal may maintain an action against the pledgee without discharging the lien, or at least giving the pledgee *a right to recover the amount of the lien in the damages.*" But, in the 6th edition, by Mr. Bennett, it is added: "Later decisions have, however, fully settled the law, that a pledge by a factor of his principal's goods is wholly tortious, and the owner may recover the whole value of the pledgee, *without any deduction or recoupment for his claim against the factor.*" And I may mention that I have reason to believe this rule as to liens was acted upon a few days ago in the

Court of Queen's Bench. [Siebel *v.* Springfield, 9 Law T. (N. S.) 325.] . . .

It should seem, then, that the bailment in the present case was terminated by the sale before the stipulated time; and, consequently, that the title of the plaintiff to the goods became as free as if the bailment had never taken place. If he had brought an action against an innocent vendee, the passage I have already cited from Story, § 325, demonstrates that he might have recovered the absolute value of the goods as damages. Why should he be in a worse condition in respect of an action against the pledgee who has violated the contract of pledge?

The true doctrine, as it seems to me, is, that, whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover, which stands in the place of such resumption.

In the present case, I think it plain that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner, against all the world. And I therefore think he ought to recover the full value of them in this action.

Nor can I see any injustice in the defendant's being thus remitted to his unsecured debt, because his lien has been forfeited by his own violation of the conditions on which it was created.

Rule absolute to reduce the damages to 40*s.*

FOWLER *v.* GILMAN.

Massachusetts, 1847. 13 Met. 267.

Trover for a wagon. At the trial in the Court of Common Pleas, before Washburn, J., there was evidence tending to

show that one Orfut, under whom the defendant claimed title to the wagon, bargained the same to Henry Fowler under whom the plaintiff claimed it, the bargain being that the wagon should be said Henry's upon his paying a certain price; that Orfut sold his interest in the wagon to the defendant, who had knowledge of the aforesaid bargain, and that said Henry sold his interest in the wagon to the plaintiff; that said Henry made several payments towards the agreed price; and that when Orfut sold his interest to the defendant, a balance of $14 was due towards the contract price for the wagon.

It was also in evidence that, while the wagon was in the defendant's possession, the plaintiff tendered to him the aforesaid sum of $14, and demanded the wagon of him, and that he refused to accept the sum tendered, denying the plaintiff's title. No money was paid into court, and there was no evidence that the defendant demanded the $14 of the plaintiff, after the tender. The plaintiff's counsel asked the judge to instruct the jury that, in fixing the amount of damages, if they should find for the plaintiff, they should not deduct the $14 from the estimated value of the wagon. The judge so instructed the jury, who found a verdict for the plaintiff for the full value of the wagon. The defendant alleged exceptions to the judge's instructions.

SHAW, C.J. It appears to us that the jury should have been instructed to deduct the fourteen dollars from the value of the wagon, in case of a verdict for the plaintiff. No doubt the true general rule of damages, in trover, is the value of the goods at the time of conversion, with interest. Kennedy *v.* Whitwell, 4 Pick. 466. This rule applies where the plaintiff is the general owner, or is answerable over to others. But where the plaintiff admits that the defendant has a lien on the property, to a certain amount, that amount may be deducted by the jury, in assessing damages. Green *v.* Farmer, 4 Bur. 2214, 2223; Chamberlin *v.* Shaw, 18 Pick. 283; Dresser Manuf. Co. *v.* Waterston, 3 Met. 9.

It is to be taken in this case, and the plaintiff by his tender has admitted, that the defendant had the same lien on the

wagon which Orfut had when he sold his interest therein to the defendant, namely, a lien for the unpaid balance of the price which Henry Fowler had agreed to pay for the wagon, before it should become his property. The amount of that lien is agreed to have been fourteen dollars.

By consent of parties, the verdict may be amended by deducting fourteen dollars therefrom, and judgment be rendered on the verdict so amended. Otherwise, the verdict will be set aside, and a new trial had in the Court of Common Pleas.[1]

JACKSON *v.* TURRELL.

New Jersey, 1877. 39 N. J. L. 329.

Dixon, J. Byard, being the owner of a plot of land in Paterson, mortgaged it, Feb. 2, 1871, to the Washington Life Insurance Company, which forthwith duly recorded the mortgage. Afterwards, on Feb. 6, 1872, he executed a second mortgage thereon to Benson, which was duly registered and then assigned to the plaintiff. Subsequently Byard placed a boiler and engine upon the premises. On Oct. 1, 1872, he conveyed the property to the Paterson Silk Manufacturing Company, which, on Jan. 16, 1873, executed to Miller a mortgage upon the realty, and a separate mortgage, securing the same debt, upon the boiler and engine

[1] "Where one has a special property in a chattel, or a lien thereon, he may in some instances recover its full value against a wrong-doer who appropriates it; but as in such case he recovers all that exceeds his own special property or interest therein, for the benefit of the general owner, when the wrong-doer is not a third person, but the general owner himself, his rights are fully maintained, and circuity of action is avoided, by permitting him to recover the value or amount of his special property or interest alone. He is thus fully indemnified, the balance of the value is with those entitled to it, and the whole controversy is thus settled in a single suit. Chamberlin *v.* Shaw, 18 Pick. 278; Fowler *v.* Gilman, 13 Met. 267; King *v.* Bangs, 120 Mass. 514; Burdick *v.* Murray, 3 Vt. 302; Spoor *v.* Holland, 8 Wend. 445." Devens, J., in White *v.* Allen, 133 Mass. 423 (1882).

as chattels. On June 26, 1874, Miller sold the boiler and engine, under his chattel mortgage, to the defendant, who immediately removed them from the premises.[1] . . .

The next objection which the defendant urges is, that as there was a prior unsatisfied mortgage upon the premises, the holder of which had not waived his right to recover of the defendant for the removal of the fixtures, the plaintiff being second mortgagee only, could not maintain an action. The ground upon which a mortgagee, not in possession, may support a suit at law against the mortgagor, or his alienee, for damages resulting from acts injurious to the mortgaged premises, has not been settled in the courts of this State, and the adjudications on that subject, outside of New Jersey, are not in accord, as will be perceived by a reference to the cases already cited. Sometimes the mortgagee has been deemed the legal owner of the fee as against the mortgagor and his assigns, and so entitled to hold them responsible for any act, beyond ordinary use, injurious to the land, to the full extent of that injury; and in Gooding *v.* Shea, 103 Mass. 360, a third mortgagee was regarded as standing in that position, and having the right to full damages, notwithstanding the fact that the prior mortgagees had superior rights to the same damages, unless the defendant could show that some of those prior mortgagees had appropriated the damages to themselves. See also Byrom *v.* Chapin, 113 Mass. 308, and King *v.* Bangs, 120 Mass. 514.

For so broad a claim on behalf of a first mortgagee, technical arguments, deserving of serious consideration, may perhaps be adduced; but, I think, no subsequent mortgagee can establish a like title. The reasons which support the claim of the first mortgagee defeat the claim of every other one, to be regarded as the legal owner of the fee. A second mortgagee is, in law, as in equity, a mere lien-holder, and in that character alone can he enforce any demand for redress.

In the case of Van Pelt *v.* McGraw, 4 Comst. 110, the right of mortgagees to maintain such suits is declared to rest

[1] Part of the opinion is omitted.

upon the principle that the mortgage, as a security, has been impaired, and the damages, it is said, are to be limited to the amount of injury to the mortgage, however great the injury to the land may be. Upon this principle all mortgagees may stand, and it is recommended by the consideration that it gives to each party actually injured a remedy measured by the injury received. It obviates some technical objections, as well as some practical difficulties, which attend the rule first adverted to, and enables the courts of law to do justice by their equitable action on the case. Sometimes the facts disclosed at the trial may be of such a nature as to make it doubtful whether the damages should go to the plaintiff or to an earlier mortgagee; but, in those cases, the defendant is placed in no greater danger than is a defendant in an action upon a policy of insurance, brought by the owner, where the loss is made payable to the mortgagee, and the language of the court in such a case (Martin *v.* Franklin Fire Insurance Co., 9 Vroom, 140, 145) indicates a mode in which all interests may be guarded: "The rights of the (earlier) mortgagee can be protected by payment of the money into court, and the insurer (defendant) may obtain indemnity against any subsequent suit by the (earlier) mortgagee, by the action of the court into which the money is paid; if actions be pending at the same time by the owner and the mortgagee (two mortgagees), the court, under its equitable powers, can so control the litigation that no injustice will be done."

Section 4. — *Higher Intermediate Value.*

MAYNARD *v.* PEASE.

Massachusetts, 1868. 99 Mass. 555.

Foster, J. This is a bill of exceptions, and is expressly stated not to be a report of all the evidence. The plaintiff has been permitted to obtain a verdict on the last count in

his amended declaration, which alleges that the defendants as factors received his tobacco, and agreed that they would not sell it at less than forty cents by the pound, and would hold it subject to the plaintiff's order until they should sell it at that price; but that they did not sell it at that price, nor hold it subject to his order, nor obey his orders in relation thereto; and that he ordered them to forward it to him at Boston, which they refused to do; and that it was worth forty cents the pound at the time when they so refused; and that they have ever since refused to forward it or deliver it to him, and he has wholly lost it. The verdict of the jury establishes these allegations.

The only instructions open for revision relate to the measure of damages. The presiding judge was requested to rule that, if any tobacco was sold for less than forty cents the pound after that limit was imposed, the defendant would be responsible in damages only to the extent of the fair market value at the time it was sold. This he declined to do, except with modifications; and the rule of damages which he stated was, in substance, that the plaintiff might recover for the loss sustained by failure to obey his orders, not exceeding forty cents the pound or the market value at the time when the return of the tobacco was demanded; but that the increase of market value up to forty cents the pound before the demand for a return was an item of damage. We perceive nothing in this rule of which the defendants can justly complain. The sale of the tobacco below the limit of their authority was a breach of their agreement, and they cannot restrict the damages to the market value at that precise point of time. The injury may have consisted not in selling below the existing market price, but in choosing a time for sale when the market was depressed, and a favorable price could not be realized. The consignor had a right to insist that the goods should be held until his price could be obtained.

We do not find it necessary to decide what rule of damages is absolutely correct. It has sometimes been said that the highest market price before action brought is the standard;

at others that the highest value before the trial may be awarded. It is safe to say that the factor is at least liable for the highest market value of the goods within a reasonable time after a sale in violation of instructions. And in the present case there can be no doubt that the time when the plaintiff demanded the return of the goods was soon enough after the defendants' disobedience of instructions to make the highest market price previous to that date a limit sufficiently favorable to the defendants.

H. Morris, for the defendants.

G. M. Stearns & M. P. Knowlton, for the plaintiff.

Exceptions overruled.

BAKER *v.* DRAKE.

New York, 1873. 53 N. Y. 211.

RAPALLO, J.[1] The most important question in this case is that which relates to the rule of damages. The judge at the trial, following the case of Markham *v.* Jaudon, 41 N. Y. 235, instructed the jury that the plaintiff, if entitled to recover, was entitled to the difference between the amount for which the stock was sold by the defendants and the highest market value which it reached at any time after such sale down to the day of trial.

This rule of damages has been recognized and adopted in several late adjudications in this State in actions for the conversion of property of fluctuating value; but its soundness, as a general rule, applicable to all cases of conversion of such property, has been seriously questioned, and is denied in various adjudications in this and other States.

This court has, in several instances, intimated a willingness to re-examine the subject, and in Mathews *v.* Coe, 49 N. Y. 57, *per* Church, C.J., stated very distinctly that an unqualified rule, giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, could not

[1] Part of the opinion is omitted.

be upheld upon any sound principle of reason or justice, and that we did not regard the rule referred to so firmly settled by authority as to be beyond the reach of review, whenever an occasion should render it necessary.

Whether the present action is one for the conversion of property of the plaintiff, or for the breach of a special contract, presents a serious question, but that inquiry is perhaps unimportant on the question of damages and will be deferred for the present, and the case treated as if it were one of conversion.

Regarding it in that light, the question is whether or not, under the circumstances of the case, the rule adopted by the court below affords the plaintiff more than a just indemnity for the loss he sustained by the sale of the stock. It is not pretended that the defendants realized any profit by the transaction, and therefore the inquiry is confined to the loss sustained by the plaintiff.

It does not appear that there was any express contract made between the parties, defining the terms upon which the defendants were to purchase or carry stocks for the plaintiff. All that appears upon that subject in the evidence is, that the plaintiff, through his friend Rogers, deposited various sums of money with the defendants, and from time to time directed them to purchase for his account shares of stock to an amount of cost from ten to twenty times greater than the sums deposited; which they did. No agreement as to margin or as to the carrying of the stock by the defendants is shown by the evidence, but the plaintiff alleges in his complaint that the agreement was that he should deposit with the defendants such collateral security or margin as they should from time to time require; and that they would purchase the stock and hold and carry the same, subject to the plaintiff's direction as to the sale and disposition thereof, as long as the plaintiff should desire, and would not sell or dispose of the same unless plaintiff's margin should be exhausted or insufficient, and not then, unless they should demand of the plaintiff increased security, or require him to take and

pay for the stocks, and give him due notice of the time and place of sale, and due opportunity to make good his margin.

The answer denies only the agreement to give notice of the time and place of sale, admitting by implication that in other respects the agreement is correctly set forth.

This is all that appears upon the record in reference to the contract under which the stocks were purchased.

The transactions under this contract appear in detail by a final account rendered by the defendants to the plaintiff, after the stock had been sold. This account was upon the trial admitted to be correct, the plaintiff reserving the right only to dispute certain charges of interest, which, however, if successfully assailed, would not vary the result to an extent sufficient to affect the reasoning based upon it.

From this account it appears that the plaintiff had, during the whole course of his transactions with the defendants, advanced in the aggregate but $4240 toward the purchase of shares, which, at the time of the alleged wrongful sale, Nov. 14, 1868, had cost the defendants upward of $66,300 over and above all the sums so advanced by the plaintiff.

By the stock lists in evidence it appears that these shares were then of the market value of less than $67,000, and the surplus arising from the sale, after paying the amount due the defendants, amounted to only $558, which sum represents the value at that time of the plaintiff's interest in the property sold.

It so happened, however, that within a few days after the sale the market price of the stock rose, and that at the time of the commencement of this action, Nov. 24, 1868, the shares would have brought some $5500 more than the sum for which they had been sold. But after the commencement of the action, and before the trial, the stock underwent alternate elevation and depression, and reached its maximum point in August, 1869, at which time one sale, of thirty shares at 170 per cent, was proved. It afterward declined, and on the day preceding the trial, Oct. 20, 1869, the price was 143, having, for a month previous to the trial, ranged between 137 and 145.

The jury, in obedience to the rule laid down by the court, found a verdict for the plaintiff for $18,000, being just the difference between 134, which was the average price at which the defendants sold, and 170, the highest price touched before the trial; thirty-six per cent on 500 shares. More than two thirds of this supposed damage arose after the bringing of the suit.

This enormous amount of profit, given under the name of damages, could not have been arrived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not only have supplied the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience.

In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct a defendant for such a conjectural loss, its amount is a question of fact, and a finding in respect to it should be based upon some evidence. In respect to a dealing which, at the time of its termination, was as likely to result in further loss as in profit, to lay down as an inflexible rule of law that as damages for its wrongful interruption the largest amount of profit which subsequent developments disclose, might, under the most favorable circumstances, have been possibly obtained from it, must be awarded to the fortunate individual who occupies the position of plaintiff, without regard to the probabilities of his realizing such profits, seems to me a wide departure from the elementary principles upon which damages have hitherto been awarded.

An amount sufficient to indemnify the party injured for the loss, which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have

averted, is the measure of damages which juries are usually instructed to award, except in cases where punitive damages are allowable. Before referring to the authorities which are supposed to govern the question, I will briefly suggest what would be a proper indemnity to the injured party in a case like the present, and how greatly the rule under consideration exceeds that just limit.

The plaintiff did not hold the stocks as an investment, but the object of the transaction was to have the chance of realizing a profit by their sale. He had not paid for them. The defendants had supplied all the capital embarked in the speculation, except the comparatively trifling sum which remained in their hands as margin. Assuming that the sale was in violation of the rights of the plaintiff, what was the extent of the injury inflicted upon him? He was deprived of the chance of a subsequent rise in price. But this was accompanied with the corresponding chance of a decline, or, in case of a rise, of his not availing himself of it at the proper moment; a continuance of the speculation also required him to supply further margin, and involved a risk of ultimate loss.

If, upon becoming informed of the sale, he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had declined after the sale, and the plaintiff had replaced it, or had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale; would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period? If the stocks had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in

mind that we are treating of a speculation carried on with the capital of the broker, and not of the customer. If the broker has violated his contract, or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done.

But the rule adopted in Markham *v.* Jaudon, passing far beyond the scope of a reasonable indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him, with his venture out, for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end. The more crowded the calendar and the more new trials granted in the action, the better for him. He is freed from the trouble of keeping his margins good and relieved of all apprehension of being sold out for want of margin. If the stock should fall or become worthless, he can incur no loss, but, if at any period during the months or years occupied in the litigation the market price of the stock happens to shoot up, though it be but for a moment, he can, at the trial, take a retrospect and seize upon that happy instant as the opportunity for profit of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss.[1]

The most thorough consideration of the subject to be found in any reported case is contained in the extremely able opinion of Duer, J., in Suydam *v.* Jenkins, 3 Sandf. Sup. Court Reports, 619 to 647, where that accomplished jurist reviews, with great discrimination, many of the cases here referred to, and others which have not been cited, and arrives substantially at the same conclusion as that reached by Church, C.J., in Mathews *v.* Coe, that the highest price

[1] The learned judge here exhaustively considered the earlier cases bearing upon the subject.

which the property has borne at any time between its conversion and the trial cannot in all cases be the just measure of damages. The reasoning contained in that opinion is of such force as to outweigh the apparent preponderance of authority in favor of the rule claimed, and demonstrates its fallacy when applied to the facts of the present case, whether the cause of action be deemed for conversion of property or the breach of a contract.

When we consider the opposition which this rule has constantly encountered in the courts, the variety of the judgments in the cases in which it has been invoked, and the doubting manner in which it has been referred to by eminent jurists, whose decisions are cited in its support, it cannot be regarded as one of those settled rules to which the principle of *stare decisis* should apply. See Startup *v.* Cortazzi, 2 Cr., Mees. & Rosc. 165; 2 K. Com., 637, 11th ed., note; Owen *v.* Routh, 14 C. B. 327; Williams *v.* Archer, 5 Man., Gr. & Scott, 318; Archer *v.* Williams, 2 Car. & Kir. 26; Rand *v.* White Mountains R. R. Co., 40 N. H. 79; Brass *v.* Worth, 40 Barb. 648; Pinkerton *v.* Manchester R. R., 42 N. H. 424; 45 N. H. 545, and the able review of the subject in Sedgwick on Damages, pp. 550 to 555, note, 5th ed.

It seems to me, after as full an examination of the subject as circumstances have permitted, that the dissenting opinions of Grover and Woodruff, JJ., in Markham *v.* Jaudon, embody the sounder reasons, and that the rule of damages laid down in that case and followed in the present one is not well founded, and should not be sustained.

For this reason, without passing upon the other questions involved in the case, I think the judgment should be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed.

CHADWICK *v.* BUTLER.

Michigan, 1873. 28 Mich. 349.

Action for breach of contract to sell plaintiff defendant's crop of wool. At the trial the court instructed the jury "That if the plaintiffs were entitled to recover, they were entitled to the highest market price between the date of the purchase and the date of the demand."[1]

Cooley, J. The plaintiffs seem to have claimed that they were entitled to recover the highest market value between the time of the purchase and the time of bringing suit, and they were allowed to give some evidence on that theory. This was clearly wrong in going back of any default on the part of defendant, as already shown. But had they confined their questions to the time between the demand and the commencement of suit, there is no general rule that would entitle them to the recovery they claimed. A party's right of recovery must be deemed fixed at some time, and he cannot wait for an indefinite period and speculate upon the changes in the market while taking upon himself none of the risks of decline. This would put him in a better position than if he had the property in possession; for then, if he would realize upon it, he must select a particular time for making sale, and accept the price at that time; while under the rule relied upon he may have the highest price for a series of years by simply postponing the bringing of suit.

No general rule can do exact justice in all cases of failure to deliver property on demand to the party entitled, but a recovery which, at the time of the demand and refusal, would have enabled the party to purchase other property of the like kind and of equal value at the same place, is, in the absence of special circumstances, as nearly just as any the law can provide for. Bates *v.* Stansell, 19 Mich. 91.

The judgment must be reversed, with costs, and a new trial ordered.

[1] This short statement is substituted for that of the reporter. Part of the opinion is omitted.

INGRAM *v.* RANKIN.

Wisconsin, 1879. 47 Wis. 406.

TAYLOR, J.[1] Upon the question of damages, the court instructed the jury as follows: "Testimony has been given in respect to the value of this property; not the value of the property at the time it was taken, but the highest value of this property at any time since the property was taken, to the present time. *If the plaintiff be entitled to recover, he is entitled to recover the highest value of the property within that period of time, from the time it was taken to the present time.*" To this instruction the defendants duly excepted.

After a careful consideration of the decisions of this court upon the question as to the rule of damages in actions of this kind, and an examination of a large number of cases decided by the courts of other States in this country, and by the courts of England, we are satisfied that the rule as laid down by the learned Circuit Judge is not sustained by the weight of authority, and that it ought not to be adopted by this court upon principle. We think the rule adopted by the Circuit Court would in many cases work great injustice, and violate the rule that compensation for the plaintiff's loss is the true rule of damages in all cases in which he is not entitled to exemplary damages. . . .

It certainly cannot be said that this court has in any case decided that, either in actions for the non-delivery of chattels according to agreement, or in actions to recover damages for the conversion of the same, the plaintiff may recover as damages the highest market value of the chattels at any time intermediate the time when they should have been delivered according to contract, or the time when they were converted, and the day of trial. On the other hand, we think the uniform course of decision is, that the measure of damages is the value of the property at the time fixed for the delivery, or

[1] Part of the opinion is omitted.

at the time of the conversion, with interest to the day of trial; the only exception to the rule being that in case of replevin, where the property is *in esse* and supposed to be in the hands of the defendant at the time of the trial, if plaintiff recovers, he may recover as his damages the value of the property on the day of trial, excluding any value added to the same by labor or money of the defendant, or those under whom he claims.

If the question were open for consideration in this court, and we were at liberty now to fix a rule of damages in cases like the one at bar, we should feel constrained to fix the one which has already been established by this court. It is said that the rule giving as damages the highest market value intermediate the conversion or day of delivery and the day of trial, should be applied to articles of trade and commerce which fluctuate in value from day to day; and that to adhere to the rule of value at the time of the conversion would in many cases allow the wrong-doer to make profit out of his own wrong, or at all events it might prevent the plaintiff from taking advantage of a rising market, and thereby might deprive him of his reasonable expectations of profit from his investments.

There can be no force in the argument that the defendant would be allowed to make money out of his own tortious act. If the wrong-doer sells the property which he has unlawfully taken from another, the owner of the property can waive the tort and sue the tort-feasor for the money he has received upon such sale of his property, and thereby prevent him from making a profit out of his wrong. But the rule which allows the plaintiff to recover the highest market value is objectionable, because it allows him to recover speculative damages, especially when a long time elapses between the conversion and the day of trial. In most cases property which rapidly changes in value is not retained in the possession or ownership of one person for a great length of time; and it would be a matter of the utmost doubt whether the plaintiff, had he not been deprived of the possession of his property, would have realized the highest market value to which it might have

attained during the time of the conversion and the time of trial; and in those cases where the market value is very fluctuating, great injustice would be done by this rule to the man who honestly converted such property, in the belief that it was his own, if, after the lapse of five or six years, he should be called upon to pay the highest market value it had attained during that time. The hardship of enforcing this rule in the case of stocks, which is perhaps property of the most unfixed value, forced the Court of Appeals in New York to repudiate the rule, after it had been partially adopted by the courts of that State. See Baker *v.* Drake, 53 N. Y. 211; Bank *v.* Bank, 60 N. Y. 42. . . .

The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels, and in all actions for the wrongful and unlawful taking of chattels, whether such as would formerly have been denominated *trespass de bonis* or trover, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss, and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others.

We have concluded, therefore, to adhere to the general rule laid down by this court in the cases cited, and hold that in all actions, either upon contract for the non-delivery of goods, or for the tortious taking or conversion of the same, "unless," in the language of Sedgwick (Damages, 6th ed., p. 1591), "the plaintiff is deprived of some special use of the property anticipated by the wrong-doer," and in the absence of proof of circumstances which would entitle the plaintiff to recover exemplary or punitory damages, the measure of damages is, *first*, the value of the chattels at the time and place when and where the same should have been delivered, or of the wrongful taking or conversion, with interest on that sum to the date of trial; *second*, if it appears that the defendant, in case of a wrongful taking or conversion, has sold the chattels, the

plaintiff may, at his election, recover as his damages the amount for which the same were sold, with interest from the time of the sale to the day of trial; *third*, if it appears that the chattels wrongfully taken or converted are still in the possession of the defendant at the time of the trial, the plaintiff may, at his election, recover the present value of the same at the place where the same were taken or converted, in the form they were in when so taken or converted.

These rules will prevent the defendant from making profit out of his own wrong, will give the plaintiff the benefit of any advance in the price of the chattels when defendant holds possession of the same at the time of the trial, and on the whole will be much more equitable than the rule given by the court below. . . .

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

GALIGHER *v.* JONES.

United States Supreme Court, 1889. 129 U. S. 193.

Bradley, J.[1] This is a suit brought by Jones, a stock-broker, against his customer, for the balance of account alleged to be due to the plaintiff arising out of advances of money and purchases and sales made, and commissions. Galigher, the defendant below, in his answer, alleged that in the month of November, 1878, the plaintiff, as defendant's agent, held for him 600 shares of mining stock, known as "Challenge" stock; and without his consent, on the 27th and 29th of said November, sold the same for his, the plaintiff's, own use, to the damage of the defendant of $2850.

The case was tried by a referee appointed by the court. As to the alleged wrongful sale by the plaintiff of 600 shares of "Challenge" stock, the referee found that the plaintiff

[1] Part of the opinion is omitted.

held such stock for the defendant, and on the 27th and 29th of November, 1878, of his own motion, and without notice to the defendant, sold it for $1.25 per share; that in December the stock sold as high as $2 per share; in January the highest price was $3.10; in February the highest price was $5.50. The referee allowed the defendant the highest price in January, namely, $3.10 per share, being an advance of $1.85 above what the plaintiff sold the stock for, which, for the whole 600 shares, amounted to $1110. The reason assigned by the referee for not allowing the defendant the highest price in February (namely, $5.50 per share) was that before that time the defendant had reasonable time, after receiving notice of the sale of his stock by the plaintiff, to replace it by the purchase of new stock, if he desired so to do; and he allowed him the highest price which the stock reached within that reasonable time. In this conclusion we think the referee was correct, and as to this item we see no error in the result. . . .

It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any

time; and hence, with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust.

The rule of highest intermediate value as applied to stock transactions has been adopted in England and in several of the States in this country; whilst in some others it has not obtained. The form and extent of the rule have been the subject of much discussion and conflict of opinion. The cases will be found collected in Sedgwick on the Measure of Damages [479], vol. 2, 7th ed. 379, note (b); Bayne on Damages, 83 (92 Law Lib.); 1 Smith's Lead. Cas. (7 Amer. ed.) 367. The English cases usually referred to are Cud *v.* Rutter, 1 P. Wms. 572, 4th ed. [London, 1777], note (3); Owen *v.* Routh, 14 C. B. 327; Loder *v.* Kekulé, 3 C. B. (N. S.) 128; France *v.* Gaudet, L. R. 6 Q. B. 199. It is laid down in these cases that where there has been a loan of stock and a breach of the agreement to replace it, the measure of damages will be the value of the stock at its highest price on or before the day of trial.

The same rule was approved by the Supreme Court of Pennsylvania in Bank of Montgomery *v.* Reese, 26 Penn. St. (2 Casey), 143, and Musgrave *v.* Beckendorff, 53 Penn. St. (3 P. F. Smith) 310. But it has been restricted in that State to cases in which a trust relation exists between the parties, — a relation which would probably be deemed to exist between a stock-broker and his client. See Wilson *v.* Whitaker, 49 Penn. St. (13 Wright) 114; Huntingdon R. R. Co. *v.* English, 86 Penn. St. 247.

Perhaps more transactions of this kind arise in the State of New York than in all other parts of the country. The rule of highest intermediate value up to the time of trial formerly prevailed in that State, and may be found laid down in Romaine *v.* Van Allen, 26 N. Y. 309, and Markham *v.* Jaudon, 41 N. Y. 235, and other cases, — although the rigid application of the rule was deprecated by the New York

Superior Court in an able opinion by Judge Duer, in Suydam *v.* Jenkins, 3 Sandford, N. Y. 614. The hardship which arose from estimating the damages by the highest price up to the time of trial, which might be years after the transaction occurred, was often so great, that the Court of Appeals of New York was constrained to introduce a material modification in the form of the rule, and to hold the true and just measure of damages in these cases to be, the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. This modification of the rule was very ably enforced in an opinion of the Court of Appeals delivered by Judge Rapallo, in the case of Baker *v.* Drake, 53 N. Y. 211, which was subsequently followed in the same case in 66 N. Y. 518, and in Gruman *v.* Smith, 81 N. Y. 25; Colt *v.* Owens, 90 N. Y. 368; and Wright *v.* Bank of Metropolis, 110 N. Y. 237.

It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole it seems to us that the New York rule, as finally settled by the Court of Appeals, has the most reasons in its favor, and we adopt it as a correct view of the law.

Section 5. — *Damages upon Severance from Realty.*

FORSYTH *v.* WELLS.

Pennsylvania, 1861. 41 Pa. 291.

Lowrie, C.J. We are to assume that it was by mistake that the defendant below went beyond his line in mining his coal, and mined and carried away some of the plaintiff's coal, and it is fully settled that for this trover lies. 3 S. & R. 515; 9 Watts, 172; 8 Barr, 294; 9 Id. 343; 9 Casey, 251.

What, then, is the measure of damages? The plaintiff insists that, because the action is allowed for the coal as per-

sonal property, that is, after it had been mined or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done.

Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form, rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office.

Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of personal property lost by one and found by another, and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion, and of wrongful taking and conversion, and it affords compensation not only for the value of the goods, but also for outrage and malice in the taking and detention of them. 6 S. & R. 426; 12 Id. 93; 3 Watts, 333. Thus form yields to purpose for the sake of completeness of remedy. Even the action of replevin adapts itself thus. 1 Jones, 381. And so does trespass. 7 Casey, 456.

In very strict form, trespass is the proper remedy for a wrongful taking of personal property, and for cutting timber, or quarrying stone, or digging coal on another man's land and carrying it away; and yet the trespass may be waived and trover maintained, without giving up any claim for any

outrage or violence in the act of taking. 3 Barr, 13. It is quite apparent, therefore, that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. When there is no fraud, or violence, or malice, the just value of the property is enough. 11 Casey, 28.

When the taking and conversion are one act, or one continued series of acts, trespass is the more obvious and proper remedy; but the law allows the waiver of the taking, so that the party may sue in trover; and this is often convenient. Sometimes it is even necessary; because the plaintiff, with full proof of the conversion, may fail to prove the taking by the defendant. But when the law does allow this departure from the strict form, it is not in order to enable the plaintiff, by his own choice of actions, to increase his recovery beyond just compensation; but only to give him a more convenient form for recovering that much.

Our case raises a question of taking by mere mistake, because of the uncertainty of boundaries; and we must confine ourselves to this. The many conflicting opinions on the measure of damages in cases of wilful wrong, and especially the very learned and thoughtful opinions in the case of Silsbury *v.* McCoon, 4 Denio, 332, and 3 Comst. 379, warn us to be careful how we express ourselves on that subject.

We do find cases of *trespass*, where judges have adopted a mode of calculating damages for taking coal, that is substantially equivalent to the rule laid down by the Common Pleas in this case, even where no wilful wrong was done, unless the taking of the coal out by the plaintiff's entry was regarded as such. But even then, we cannot avoid feeling that there is a taint of arbitrariness in such a mode of calculation, because it does not truly mete out just compensation. 5 M. & W. 351; 9 Id. 672; 3 Queen's B. 283; and see 28 Eng. L. & E. 175. We prefer the rule in Wood *v.* Morewood, 3 Queen's B. 440, n., where Parke, B., decided, in a

case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages is the fair value of the coals, as if the coal-field had been purchased from the plaintiffs. See also Bainbridge on Mines and Minerals, 510; 17 Pick. 1.

Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whiskey, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article. 6 Hill, 425 and note; 21 Barbour, 92; 23 Conn. 523; 38 Maine, 174.

Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value *in place*, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits. 7 Casey, 456.

Judgment reversed, and a new trial awarded.

READ, J., dissented.

McLEAN COUNTY COAL CO. *v.* LONG.

Illinois, 1876. 81 Ill. 359.

BREESE, J. This was trover, in the McLean Circuit Court, by John Long, plaintiff, and against the McLean County Coal

Company, defendants, to recover damages for the conversion of a quantity of coals taken from the land of plaintiff.

There is no controversy about the fact of taking and converting the coals, the only question being as to the measure of damages.

The leading facts are, that defendants had in the summer of 1872 sunk and worked a shaft on their own land, three hundred and thirty-three feet west of the west boundary of plaintiff's lots, to the depth of five hundred and forty-nine feet. At the session of the General Assembly held in 1872, an act was passed providing for the health and safety of persons employed in coal-mines, in force July 1, 1872, in which it was provided that an accurate map or plan of the workings of each coal-mine, showing, among other things, the general inclination of the strata, together with any material deflections in the workings, should be made, and a copy thereof filed in the recorder's office of the proper county. R. S. 1874, ch. 93, p. 704.

Upon making and filing a map of appellant's mine, appellee discovered for the first time, in 1873, that appellants had worked out of bounds, and, in 1872, taken from his land coals which were found to amount to six hundred and ten tons, from a stratum about two feet thick. When appellee made this discovery, he went to the proper officer of the company and demanded the coal, and on another occasion demanded pay for it. At the time of the demand not a pound of this coal was in possession of the company, it having been sold and disposed of months before. When this demand was made, appellants replied, the land did not belong to them, and that they were responsible to one Cox.

The action was brought to the February term, 1874.

The controversy was upon the measure of damages. Appellants' theory was, the value of the coal when first it became a chattel; that of appellee, its value in the market; which latter theory the court accepted, and gave, of its own motion, the following instruction: —

"The court instructs the jury that if they believe, from the

evidence, that the defendant wrongfully took and converted to its own use the coal of plaintiff, as alleged in plaintiff's declaration, the jury will find the defendant guilty, and assess the plaintiff's damages at the fair market value of the coal at the time the same was sold and converted by defendant to its own use, and to this amount, so ascertained, the jury may, in their discretion, allow interest at the rate of six per cent per annum from the date of such conversion to the present time."

The jury found for the plaintiff, and assessed the damages at twelve hundred and eighty-one dollars, for which the court rendered judgment, overruling defendants' motion for a new trial, and the defendants appeal.

When this coal was taken to the mouth of the shaft, it was worth at the shaft two dollars and ten cents per ton, and this the jury allowed, no deduction being made for the cost of getting it to the mouth of the shaft, — all evidence offered by appellants on this point being ruled out by the court.

Is the rule given to the jury by which to measure the damages a correct rule, having its foundation in reason and authority?

Common observation and reason inform us that these coals, in their native bed, more than five hundred feet below the surface of the ground, were of no appreciable value; they were made valuable by the labor and expense of appellants; by these they obtained a market value.

How are the authorities upon this question? Martin *v.* Porter, 5 Meeson and Welsby, 351, is cited by appellee. That was trespass for breaking and entering plaintiff's close, and breaking and entering a certain coal-mine under the close, and taking and carrying away the coal, and converting and disposing of it to the use of the defendant.

The plaintiff claimed that he had a right to hold the defendant liable for the value of the coal when gotten and when first it existed as a chattel, without any deduction for the expense of getting it.

PARKE, Baron, before whom the cause was tried, said that the plaintiff would have been entitled, in an action of trover,

to the value of the coal as a chattel, either at the pit's mouth or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing anything for having worked and brought it there; that not having made such a demand, and the action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away; that is, as soon as it existed as a chattel; which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got, to the pit's mouth.

In the Exchequer, the rule, so given by Parke, Baron, was held by the whole court as the true rule.

This rule was adhered to in Wild *et al. v.* Holt, 9 Mees. and Wels. 671, and also in the Court of Queen's Bench, in Morgan *v.* Powell, 3 Adolphus and Ellis, 278, 43 Eng. C. L. 734.

This question came before this court at the January term, 1874, in Robertson *v.* Jones *et al.*, 71 Ill. 405, and the same rule was announced. In California the same doctrine is held. Magi *v.* Tappan, 23 Cal. 306. See also, Moody *v.* Whitney, 38 Maine, 174. Other cases might be cited, but it is unnecessary, as this court has recognized the rule as a correct one in Robertson *v.* Jones *et al.*

But it is said these were actions of trespass, and while the rule may be a just one in such an action, it is not so in trover.

The ordinary principle is, that a party is entitled to recover compensation only for the damage he has actually sustained, no matter what may be the form of action. A different rule of damages does not prevail in trespass for breaking and entering a coal-mine and carrying away coals, and trover for the coals, except when circumstances of aggravation are relied on in trespass. The rule is the same in both forms of action. Mayne on Damages, 290.

No matter what the form of action, unless it be an action in which vindictive damages, so called, are sought, the jury are restricted to compensation for the pecuniary loss sus-

tained by the plaintiff, and in this case, as these authorities hold, the estimate of loss depends on the value of the coal when severed from the soil; that is, the price at which the plaintiff could have sold it. This, it is clear, was the value of the coal at the moment it was severed by the defendants and thrown into the run. It was at that moment, when defendants had made it a chattel, exercising control over it, that the conversion was complete. For the expense and trouble of separating it from its kindred layers and making it a chattel, the defendants cannot claim to be reimbursed; but the coal had no value as a salable article without being taken from the pit, and any person purchasing the coal in the pit would have deducted from the price the cost of bringing it to the pit's mouth.

This is, substantially, said by Lord Ch. J. DENMAN, in delivering the opinion in Morgan *v.* Powell, and meets our approval.

It follows, from these authorities, the rule given to the jury by which to measure the damages, was not the correct rule. During the trial, and whilst the examination of the witnesses was progressing, the court made this statement: —

"I can now state what I think the measure of damages is. I understand the measure of damages is, the value of the coal at the time of conversion. I think the measure of damages is, the value of the coal at the mouth of the shaft, less the expense of drawing it up."

Had the court adhered to this rule, it would have conformed to the authorities, and especially to the decision of this court in Robertson *v.* Jones *et al.*

The doctrine announced in the cited cases has received the sanction of this court in Sturgis *et al. v.* Keith, 57 Ill. 451, though the subject in controversy was of a different nature. That was trover for certain railroad stocks which the plaintiff had deposited with defendant, who refused to deliver them on demand. The plaintiff claimed he could select any time at which the stocks were at the highest market value, and recover accordingly; and such had been the ruling of several

reputable courts. This court held, as a principle governing this action, that the value of the stocks at the time of the conversion was the measure of damages; and in that case the conversion was established by the refusal to deliver on demand. The principle is, when the chattel is converted, then the damages are to be estimated.

In this case no demand was necessary, as the taking of the coals was tortious. Then, on the principle of the above cited case, the damages must be computed from the time the coal first became a chattel, for the conversion was complete when defendants severed it and threw it into their run.

The cases in trover, cited by appellee, are not decisive of this case. We think the authorities above referred to are very satisfactory, and this case is properly settled by them. On the authority of these cases, and they are in harmony with justice, the court should have told the jury the plaintiff could recover as damages the value of the coal at the mouth of the shaft, less the cost of conveying it from the place where it is dug to the mouth of the shaft. This is, in effect, saying he can recover the value of the coal when it first became a chattel by being severed from the mass, and under their control.

For the errors indicated the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion. *Judgment reversed.*

SINGLE *v.* SCHNEIDER,

Wisconsin, 1869. 24 Wis. 299.

Paine, J. This action was brought to recover possession of certain lumber, which it was claimed had been manufactured from logs cut without authority upon the plaintiff's land. There was evidence tending to show that the defendants, who owned land adjoining the plaintiff's, got over the line by mistake. And there was also some evidence tending to show that they cut some on the plaintiff's land,

after they were notified of the mistake. There was also an offer of a tax deed in evidence, which was rejected; and the plaintiff's affidavit shows that the defendants claimed title to the property under this tax deed. There was some talk between the parties about the defendants settling with the plaintiff for what they had cut; but this does not seem to have been done. Nor did the plaintiff take any steps to recover the logs, but marked them and kept watch of them at the mills until they were sawed and rafted, and then brought this action to recover the lumber. The defendants gave an undertaking under the statute, and retained the property. The jury found for the plaintiff, and assessed the value of the property at the entire value of the lumber as it was proved to have been at the time of commencing this suit.

The material and interesting question in the case is, whether, assuming the logs to have been cut on the plaintiff's land, he ought to recover the entire value of the lumber, without any deduction for the labor of the defendants in cutting, hauling, and manufacturing the logs into the lumber.

If the action had been for the trespass or conversion, he could only have recovered the value of the timber at the time it was taken, at least if it was taken by mistake. Weymouth *v.* The Ch. & N. W. R. R. Co., 17 Wis. 550. And, upon the evidence and the whole record, I think these defendants stand in as favorable a position as though it were conceded that the logs were taken by mistake. There is proof tending to show a mistake as to a part; and it appears, also, from the plaintiff's affidavit, that they claimed title to the land. They are not to be regarded, therefore, as wilful trespassers. Upon these facts, it seems contrary to the dictates of natural justice, that the plaintiff should be allowed to wait quietly until the defendants had manufactured the logs into lumber, enhancing their value four or five fold, and then recover against them that entire value. True, it is generally recognized that a wrong-doer cannot, by changing the form of another's property, change the title. The owner may pursue it, and reclaim it specifically by whatever remedy the law gives him for that

purpose. If he gets it, it is his. But the apparent injustice of allowing one to thus avail himself of the labor and money of another, in cases similar to this, has led to a modification of this stringent rule of ownership, wherever the question is resolved into one of mere compensation in money for whatever injury the party may have suffered. This modification has thus far been developed almost entirely in actions of trespass or trover, like that of Weymouth *v.* Ch. & N. W. R. R. Co., and the cases therein referred to. But, in the recent case of Herdic *v.* Young, 55 Pa. St. 176, the Supreme Court of Pennsylvania applied the same rule in an action of replevin. They there held that, inasmuch as the law gave the defendant the power to retain the property by giving a bond, whenever he availed himself of that right, the question became then one of damages merely, and that the form of action ought not to produce a difference in the result. The damages to be recovered should be the same as though the action were trespass. This case seems to us so well adapted to the promotion of justice and the prevention of injustice, that we have concluded to follow it. To apply that rule here would have required the value of the property to have been assessed at the full value of the lumber, deducting the expense of all that the defendants had done upon it down to the time the suit was begun. As remarked by the court in that case: "Such a standard of damages, growing out of the nature of the act and the form of the action, is reasonable, and does justice to both parties. It saves to the otherwise innocent defendant his labor and money, and gives to the owner the enhancement of the value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities, and other adventitious causes." Our statute provides that the jury shall assess the value of the property. But that is merely as the basis of recovery in case a delivery cannot be had. The intent was, to fix the value that the plaintiff was entitled to recover. Thus, in case of a lien or other special interest, the value to be fixed would be the amount of that lien or interest. Booth *v.* Ableman, 20 Wis.

21. And although, in strict law, the plaintiff is the general owner of the property, yet, when it is once settled that he ought not to recover the value it has received from the defendant's labor, the application of the rule would seem to place him upon substantially the same footing with the owner of a special interest, so far as ascertaining the value is concerned. Perhaps the best way in such a case would be, to direct the jury to find the actual entire value of the property, and to find specially the amount to which its value had been enhanced by the defendant's labor. And then, in case of judgment for the plaintiff, it would be in the alternative, for a delivery, or, if that could not be had, for the amount of the difference between the two sums thus found.

It is quite probable that this question was not distinctly presented to the court below. But it seems to be fairly raised by the motion for a new trial, on the ground that the verdict was against the law and the evidence; and that motion ought to have been granted.

For this reason the judgment must be reversed, and the cause remanded for a new trial.

By the Court. — Ordered accordingly.[1]

[1] "In my opinion, it is immaterial whether the property is taken by mistake or intentionally, unless in the latter case the taking is of such a character as to make the doctrine of exemplary damages applicable. It is not every intentional trespass or conversion that makes a case for exemplary damages. If a man takes a tree from my land by mistake, I am damaged just as much as though he took it intentionally; and if in case of mistake I ought to recover only the value of the tree, although he may have manufactured it into costly furniture, for the reason that the value of the tree is all that I have lost, then the fact that he took it knowing it to be mine ought not to vary the rule of damages, for the plain reason that my loss is the same in one case as the other." Paine, J., in Weymouth *v.* C. & N. W. Ry., 15 Wis. 550, 555 (1863).

WINCHESTER *v.* CRAIG.

Michigan, 1876. 33 Mich. 205.

MARSTON, J.[1] Winchester brought an action of trover to recover damages for the conversion by defendants of a quantity of pine saw-logs.

The court charged the jury that if they found no wilful wrong on the part of the defendants, they might award as damages the value of the property where it was taken, viz.: one dollar and fifty cents per thousand, together with the profits which might have been derived from its value in the ordinary market, or that they might take the market value at Toledo, deduct precisely the sum defendants expended in bringing it to that market and putting it in condition for sale, and award the difference between these two sums, with interest, in either case, from the time the conversion took place; and refused to charge that the plaintiff could recover as damages the price for which the logs were sold in Toledo.

The finding of the jury, as appears from the printed record, was as follows: "The defendants cut the timber on the land of Ward by mistake; the quantity cut was one million ninety-three thousand seven hundred and eighty-six feet; the value on the land after it was cut was two dollars per thousand feet; the value at Toledo, and for which the defendants sold the timber, was twelve dollars per thousand; the expenses of the defendants on the timber in cutting and removing the same to Toledo, nine dollars and thirty-seven cents per thousand;" and they assessed the plaintiff's damages at the sum of three thousand six hundred and thirty-one dollars and forty cents.

It will thus be seen that the only question raised by this record is, where parties by mistake cut timber upon the lands of another, and at their own expense transport it to market

[1] Part of the opinion is omitted.

and sell it, whether the plaintiff in an action of trover can recover as damages the market value at the time and place where it was sold.

An examination of the authorities bearing upon this question shows that they are not in harmony, and that the courts have not always agreed as to the proper measure of damages in this class of cases. Some courts have held, in cases like the present, that the plaintiff could recover as damages the value of the logs at any place to which they were taken and sold or converted, while others have held such a measure of damages applicable only in cases where there was fraud, violence, or wilful negligence or wrong, and that where none of these elements appeared, but on the contrary the defendants had acted in entire good faith, and had by their labor and skill materially enhanced the value of the property converted, the plaintiff could not recover such enhanced value. In this last class of cases the decisions are not uniform as to whether the value of the property when first severed from the realty, as in cases of timber or coal where this question has arisen, or the value in its original condition, with such other damage to the realty as the injury may have caused, would constitute the proper measure.

It is apparent upon examination that there is no fixed, definite measure of damages applicable in all cases of conversion of property; and while the general rule undoubtedly is, in ordinary cases, that the full value of the property at the time and place of its conversion, together with interest thereon, is the correct measure of damages in actions of trover, yet, as was said in Northrup *v.* McGill, 27 Mich. 238, "this rule yields, when the facts require it, to the principle on which the rule itself rests, namely: that the recovery in trover ought to be commensurate, and only commensurate with the injury, whether that injury be greater or less in extent than the full value of the property and interest." Indeed, the language here quoted is but an application to actions of trover of the general rule as repeatedly declared in this State, viz.: that except in those actions where punitory or exemplary

damages may be given, and those whose principal object is the establishment of a right, and where nominal damages may be proper, the only just theory of an action for damages, and its primary object, are that the damages recovered shall compensate for the injury sustained. See Allison *v.* Chandler, 11 Mich. 542; Warren *v.* Cole, 11 Mich. 265; Daily Post Co. *v.* McArthur, 16 Mich. 447.

It is somewhat difficult to conceive why, upon principle, this rule should not be applied in its fullest extent to cases like the present. The cases, it is believed, all agree that punitory or exemplary damages are never given or allowed in cases where the defendant has acted in entire good faith, under an honest belief that he had a legal right to do the act complained of, although, even in such cases, he would be conclusively held to have contemplated, and the plaintiff would be permitted to recover, all the damages which legitimately followed from his illegal act, whether in fact he actually contemplated that such damages would follow or not. Such damages, however, would, in no just sense of the term, be held as punitory or exemplary; they would be but the actual damages which the plaintiff had suffered from the wrongful act of the defendant. Such then being the general rules applicable in cases even of active, aggressive wrongs, what is there in this case to make it an exception?

It does not require any argument, and I shall attempt none, to prove that the pecuniary injury sustained by the plaintiff, from the trespass complained of, falls far short of the value of these logs at Toledo; and that to award the value at the latter place as the measure of damages would be much more than compensation, and would, although under a different name, be but awarding exemplary damages, and that, too, in a case where upon principle the defendants had been guilty of no act calling for such a punishment.

It is also clear beyond question that had the plaintiff commenced any other form of action to recover damages for the injury which he sustained, he could not in such action recover the market value of the logs at Toledo. It is very evident,

therefore, that the right of the plaintiff to recover the value at Toledo depends entirely upon the particular form of action adopted in this case; as, in any other, where the defendants had acted honestly, he could only recover the amount of the actual injury sustained.

Passing for the present the adjudged cases, I can see no good reason or principle why the measure of damages in actions of trover should be different from that in other actions sounding in tort; and to hold that there is such a distinction is to permit the form of the action, rather than the actual injury complained of, to fix the damages. This would be giving the form of action a prominence and controlling influence to which it is in no way entitled, and would be permitting the plaintiff, by the adoption of a particular remedy, to increase the damages at pleasure, and that to an extent which would far more than compensate him for the injury which he sustained, and would also be a positive wrong to the defendants. Such a doctrine, if carried out to its logical conclusion, and applied to many cases which might arise, would be to allow the plaintiff damages so far in excess of the injury which he sustained as to cause us to doubt the wisdom of any rule which would thus sanction a greater wrong in an attempt to redress a lesser.

Let us suppose, by way of illustration, one or two cases which might easily arise: a party acting in entire good faith enters upon the lands of another by mistake, cuts a quantity of oak standing thereon, and manufactures it into square timber; this he ships to Quebec, where he sells it at a price which, as compared with the value of the standing timber, renders the latter insignificant. Or, suppose the owner, instead of selling such timber at Quebec, ships the same to some European port, and there sells it at a still greater advance. Or, suppose by mistake he cuts a quantity of long timber, suitable for masts, and forwards it to Tonawanda, or New York, and there sells it. Now, in either of these cases, would it be just to permit the owner of the standing timber, in an action of trover, to recover the value at which it was sold? Would the price for which it sold be the amount

of the actual damage which he sustained from the original cutting? The price which it brought in the market was almost wholly made up of the cost and expense of manufacturing and getting it there, no part of which cost or expense was borne by the plaintiff. Why, then, should the plaintiff recover this increased value, no part of which he contributed to in any way? Certainly not as compensation for the injury sustained by him, because he sustained no such injury. Neither could it be for the purpose of punishing the defendants, because they have committed no act calling for such a punishment. It can only be placed upon the arbitrary ground that in this form of action the plaintiff can recover the full value of his property at any place he may find it, or trace it to.

Then, again, there is no uniformity in such a rule. One man cuts timber, but does not remove it; another cuts and removes it a short distance, adding but little to its original value; while another cuts and removes it a long distance, increasing its value thereby an hundred fold. Separate actions are brought against each, the plaintiff in each case claiming to recover the value at the place to which the timber was taken. Now, it is very evident that, although the value of the standing timber in each case was the same, and the actual injury to the plaintiff in each case the same, the verdict would be very different, and the party who had in good faith done the most, and spent the most money, in giving the timber any real value, would be punished the greatest. In fact, by increasing its value he would be but innocently increasing to a corresponding amount what he would have to pay by way of damages. In other words, such a defendant, by his labor and the means which he expended in bringing the property to market, has given it nearly all the value it possesses; and when he is sued and responds in damages to the amount of such increased value, he has then paid just twice the actual market value of the property in its improved condition, less the value of the original timber standing; once in giving it its value, and then paying for it in damages according to the very value which he gave it.

It may be said, however, that all these supposed cases are exceptional and extreme; this may be true, but in testing a supposed rule of law, we have a right to apply it to extreme cases for the purpose of testing its soundness; because by so doing, if we find that when carried out it would lead to gross injustice, and would not at the same time subserve any useful purpose, but would be in violation of other well-settled legal principles, we then have a right to discard it as being unsound, not based upon sound reason or justice, and therefore contrary to the doctrines of the common law.

It might also be said, in answer to some of the cases supposed, that the plaintiff could not count upon a conversion which took place in some other State. This I am inclined to think would be correct; but in this case the plaintiff does claim to recover for a conversion which took place beyond the limits of this State. I have therefore only carried the doctrine contended for a little farther.

We need not, however, go beyond the boundaries of this State to imagine cases almost as glaringly unjust as those already supposed; indeed, the evidence in this case showed that while the value of the standing timber was one dollar and fifty cents per thousand, the value of the logs in Detroit was twelve dollars per thousand; and cases may easily be supposed where the value would be much greater.

There is another class of cases where the doctrine which plaintiff seeks to have applied would work gross injustice: a person honestly and in good faith obtains possession of some young animal; he may have purchased it from some person supposed to have a good title to it, but who in fact did not; or he may have purchased it at a judicial sale where, on account of some technical defect, the title did not pass; or it may be through a case of mistaken identity he has claimed to be the owner, whereas in truth and fact he was not. He retains possession, feeding and taking care of the animal, until in process of time it becomes full grown and immensely more valuable. This time may be longer or shorter, depending very much upon the kind of animal. If a pig, but a short

time would be required; if a calf or colt, a longer. The original owner, having at length discovered his property, demands possession, which being refused, he brings trover to recover the value. Now, most assuredly, in any of these cases, the extent of the injury which the plaintiff sustained would not be the then value of the animal. He has not fed it, taken care of it, or run any of the risks incidental to the raising of stock; all this has been done by another. Why, then, should he recover this increased value? And why should the result of the labor, care, and expense of another thus be given to him? True it is, that the amount involved in these cases is not so large, but the principle is the same.

It is sometimes said that the effect of the view which we have taken would be to compel a party to sell and dispose of property which he desired to retain as an investment, at what he might consider an inadequate price, and at a time when he would not have sold it. This may be true, yet it is no more than what happens daily, and that under circumstances much more aggravating. Take the case of a wilful trespasser: he cuts the timber of another into cord wood and burns it; or he takes his grain and feeds it; or cattle, which the owner prizes very highly, and butchers them. In all these cases the owner has lost his property, and the law cannot restore it; the law cannot do complete justice; it cannot fully and completely protect and guard the rights and feelings of others; it can but approximate to it; and because the owner in this way may be compelled to part with his property, and thus a wrong be done him, it would not improve matters to inflict a much greater wrong upon another equally entitled to protection, in order that the first sufferer might be unduly recompensed thereby. The law rather aims, so far as possible, to protect the plaintiff, but at the same time it has a due regard to the rights of the defendants, and it will not inflict an undue or unjust punishment upon them, in cases where they are not deserving it, as a means of righting an injury, especially where it would much more than compensate the owner for the injury which he sustained.

In this case each has an interest in the logs; the plaintiff as assignee of the original owner; the defendant by, in good faith, largely increasing their value. Each should be protected in his rights, and thus as nearly as possible substantial justice be done. To allow plaintiff to recover what he here seeks would be to break down all distinction between the wilful and involuntary trespasser, — a distinction which is based upon sound legal principles, and which is applied in all other forms of action.

What we have here said must not be considered as having any application in cases where the trespass or wrong complained of was wilful or negligent. We are not yet prepared to say that the wilful trespasser can derive any advantage whatever from his own wrong. On the contrary, there is sound reason for holding that the owner in such cases may reclaim his property wherever and in whatever shape he may find it.

The court under one branch of the charge instructed the jury to allow the market value at Detroit, or Toledo, less the sum of money which defendants expended in bringing it to market. This, we think, was as favorable as the plaintiff had any right in this case to expect. This was allowing the plaintiff more than the value of the timber when it was first severed from the realty. It did not permit the defendants to recover any profit upon what they had done, but protected them to the extent of the advances they had made; and this, we think, was correct.

There might, however, be cases where this rule would not apply, where the market value did not cover the cost of cutting and taking it to market, and cases where it was not sold. In such cases the plaintiff would be entitled to recover the value when the property was first severed from the realty (Greeley *v.* Stilson, 27 Mich. 154), and was thus in a shape where it could be converted, together with any profits which might be derived from its value in the ordinary market, with interest thereon. If any special damage is claimed beyond this, either to the inheritance or otherwise, it must be sought in some other and more appropriate form of action.

Judgment affirmed.

TUTTLE *v.* WHITE.

Michigan, 1881. 46 Mich. 485.

Marston, C.J. The action in this case was trover. The defendants purchased the logs in question from Sheridan & Hamilton, who cut them upon plaintiff's lands, and who were unquestionably trespassers in so doing. They, Sheridan & Hamilton, made no claim or pretence of having cut the logs under circumstances tending even to show good faith on their part. Sheridan & Hamilton sold the logs to defendants, afloat in Black Creek. It was claimed, and we shall so assume, that defendants in making the purchase acted in entire good faith; they afterwards run the logs into Flat River and there sold them at an advanced price. The material question relates to the rule laid down as to the proper measure of damages. The court charged the jury in substance, that if the defendants in purchasing these logs acted in good faith, the rule would be either the value of the logs where they were cut on the ground, with the addition of any profit there might be in handling them and bringing them to Flat River, or the value at Flat River deducting the cost of bringing them there.

We are of opinion that the facts in this case did not warrant the charge as thus given. These defendants purchased from trespassers, and if they acted in good faith in so doing, all they could ask would be protection in what they should expend in money or labor thereon thereafter. A person however in purchasing personal property runs his risk as to the title he is acquiring, and if he is unfortunate enough to purchase from a trespasser or one who has no title and can give none, he must suffer the loss or look to his vendor. To hold otherwise would be to give the trespassers the benefit of their own wrong, contrary to all the authorities. If these defendants had only made a partial payment for the

logs under their contract of purchase, and the plaintiff herein was limited in his recovery to the value of the logs when first severed from the land, then defendants would be the gainers; they would have the benefit of the trespasser's labor, and yet the latter could not maintain an action to recover the amount thereof, or the balance of the contract price. The conversion by these defendants took place when they first took charge or control over these logs in Black Creek, and they should respond in damages according to the value at that time. The same reasons do not exist in this case to protect these defendants that did in Winchester *v.* Craig, 33 Mich. 210, and Wetherbee *v.* Green, 22 Mich. 311.

There are very many cases where the value of the timber standing, or when first severed from the soil, would be but nominal, and to give wilful trespassers, or those to whom they may sell, the benefit of any increased value put upon it by the original wrong-doer, and confine the owner to the nominal value, would but encourage the commission of acts of trespass, and tend to make purchasers at least careless as to the title they were acquiring. It is easy for any one to claim that he has purchased property in entire good faith, and very difficult in many cases to establish the contrary, and if one claiming to be such, is protected to the extent of the increased value he may have in good faith added to the property, this is all he can fairly claim under the law. This rule in effect was held in Isle Royale Mining Co. *v.* Hertin, 37 Mich. 332, and much that was there said is equally applicable in the present case. We have not overlooked the case relied upon, among others cited, of Railway Co. *v.* Hutchins, 32 Ohio St. 584. We have heretofore had occasion to examine the many cases there cited, and they do not lead us to any conclusion other than the one here arrived at.

We are of opinion that the judgment should be reversed with costs and a new trial ordered.[1]

[1] "It may be that if these owners had found their wood in the hands of the trespassers, it might have been retaken, or its value as cord wood

recovered; but if so, it would be upon the principle '*in odium spoliatoris*;' the thief could gain nothing by his own wrong, and therefore the results of his labor go to the owner of the property. But this principle cannot apply where an innocent purchaser comes into the case, for the simple reason that he has done no wrong.

"It is very true that the wilful trespasser or thief can convey no title to one to whom he sells, however innocent the purchaser may be. But the question right here is, what does 'title' in this connection mean? The original owner has the 'title' to his timber, and, *as against the thief*, the title to the results of the thief's labor. The wrong-doer, as it were, being estopped from setting up any claim by virtue of the wrong he has done. Against the innocent purchaser from the thief, the original owner still has the 'title' to his timber, but by virtue of what does he now have 'title' to the thief's labor? The estoppel, so to call it, being created by fraud or wrong, exists only against the one guilty of that fraud or wrong, which the purchaser is not, and while it is effectual against the wrong-doer, the reason of it does not exist as against the innocent man, as to whom it therefore fails. As Judge Cooley says, it does not comport with notions of justice and equity, that against those who have done no wrong, these owners should recover three times the value of what they have lost. They have never spent one cent of money, nor one hour of labor, in changing this timber worth one dollar, into cord wood worth three. All this was done by some one else, and why should the owners recover for it? If they are compensated for what they have lost, and all they have lost, they are certainly fully paid. Woolsey *v.* Seeley, Wright, 360. And this is all they should be allowed to recover." Wright, J., in Railway *v.* Hutchins, 32 Oh. St. 571, 584 (1877).

CHAPTER X.

DAMAGES FOR NON-PECUNIARY INJURIES.

SECTION 1. — *Pain and Inconvenience.*

PENNSYLVANIA RAILROAD *v.* ALLEN.

Pennsylvania, 1866. 53 Pa. 276.

STRONG, J.[1] The argument addressed to us on behalf of the plaintiffs in error, is one which has often been urged, but always unsuccessfully. It is said the plaintiff below is entitled to no more than compensation measured by the pecuniary value of the injury he had sustained; that pain and personal suffering have no pecuniary value; that there is no standard by which they can be estimated; and that if a jury are allowed to take them into consideration in assessing damages, they must guess both at the intensity of the pain and at the sum which would be a compensation for it.

Hence, it is urged that inquiries into these subjects are too refined for a jury, or for any human tribunal, and that compensation ought to be allowed for nothing that cannot be measured by some defined rule. It must be admitted, that it is easier to answer this by authorities than it is by reasoning. The theory of a jury trial undoubtedly is, that it accomplishes certain results by certain rules. Ordinarily, it measures damages according to some known and recognized standard. That standard is, in most cases, a common and acknowledged measure adopted as a lesson of human experience. But where there is and can be no such experi-

[1] The opinion only is given: it sufficiently states the case.

ence, or none that can be known, damages might as well be determined by the casting of dice as by the verdict of a jury. It is conceded, they must be estimated in money. But what is the pecuniary worth of a pain? If it must be determined, it is either nothing, or it is variable according to the conjecture of those who are required to estimate it; and they must guess not only its intensity, but its value in dollars and cents. It would seem that judicial tribunals ought not to be under the necessity of deciding anything so indeterminable. Damages, if recoverable at all, ought to be such as can be measured by some comprehensible rule, — some rule that can be applied to human affairs.

Notwithstanding all this, however, it is undoubtedly true, that in some actions for personal injuries, juries in estimating the damages are to take into consideration the personal suffering caused by the wrong. So are the decisions. In cases of libel or slander, of wilful torts to the person, and in cases of negligence other than those that are breaches of contract, in cases of negligence which causes a personal injury, it has often been held that a jury may take into consideration the bodily and mental pain attendant on the injury. It must be admitted that it is no more possible to determine the pecuniary value of pain, in this class of cases, than in such a one as we now have before us. But such actions are not remedies sought for broken contracts. The wrongs complained of bear a nearer resemblance to a public offence. In assessing damages in such actions, juries are always allowed a larger license than in actions on contracts, and with some reason. In this State, at least, it seems to be the doctrine, that the circumstances attending such injuries may warrant an assessment of damages beyond those that are merely compensatory. It might well be, therefore, that a different rule should be applied to them from that which should be applied in suits on broken contracts.

Yet it is not to be denied that the authorities recognize no such difference. In this State the question has never directly arisen; but I know of no decision anywhere, that a passen-

ger personally injured by the neglect of a carrier to transport him safely, has been denied compensation for the pain caused by the injury. Such compensation is denied to one who sues for an injury to his relative rights; but the immediate sufferer has been held entitled to it whenever the question has been raised. And that such is the law is shown by the precedents. Chitty, in vol. ii. of his work on Pleading, page 647, gives the form of a declaration by a passenger against the owners of a stage-coach for overloading and improperly driving it, whereby the coach was overturned, and the plaintiff's leg was broken. In each of the counts, the great pain of the plaintiff is laid as a substantial injury. And so far as any decisions of the English courts are to be found upon this subject, they recognize the right of a plaintiff to damages for such a cause. In Theobald *v.* The Railway Passenger Assurance Co., 10 Ex. 45, where it appeared that the defendant had undertaken to pay a reasonable compensation for any personal injury received while travelling in a railway car, it was held by the Court of Exchequer that the expense, pain, and loss of the plaintiff were proper subjects, and the only proper subjects to be considered in assessing the damages. In Morse *v.* The Auburn & Syracuse Railroad Co., 10 Barb. 621, and in Curtis *v.* The Rochester and Syracuse Railroad Co., 20 Id. 283, it was decided that in actions against passenger carriers for negligence resulting in personal hurts, bodily pain and suffering are part and parcel of the injury for which the injured party is as much entitled to compensation in damages as for the loss of time and the outlay of money. These cases were reviewed by the Court of Appeals in Ransom *v.* The New York and Erie Railroad Co., 1 Smith, 415, and the doctrine asserted in them reasserted. I do not find that it has been even doubted in any court. Juries are required to estimate, in the best way they can, what is a just recompense for pain suffered. Though we have no decisions in this State, we have *dicta* of judges sufficient to indicate the same opinion of the law. In Laing *v.* Colder, 8 Barr, 479, which was an action against a passen-

ger carrier for negligence, whereby the plaintiff's arm was broken whilst he was travelling in a railroad car, Judge Bell, in delivering the opinion of this court, remarked, that "injuries to the person consist in the pain suffered, bodily or mental, and in the expenses and loss of property they occasion. In estimating damages, the jury may consider not only the direct expenses incurred by the plaintiff, but the loss of his time, the bodily suffering endured, and any incurable hurt inflicted, — for these may be classed among necessary results." A similar remark was made by the present Chief Justice in Pennsylvania Railroad Co. *v.* Kelly, 7 Casey, 379. Some of these cases recognize the difficulty of applying a pecuniary balm to suffering, but deny that this furnishes any reason why it should not be done. It must therefore be considered as a rule of law, that in actions for personal injuries, sustained by a passenger in consequence of the negligence of a passenger carrier, plaintiffs are entitled to recover pecuniary compensation for pain suffered; and that juries in assessing damages may consider that as an element. It follows, that the first assignment of error in this record cannot be sustained.

The second relates to the instruction given respecting the mode of assessment. Was that erroneous? The jury were told that the plaintiff was only entitled to recover the pecuniary value of the injuries sustained, and that in the application of this rule to the question, what damages should be given for physical pain suffered, they must exercise their own discretion, governed by their sense of justice and right, taking care not to indulge in their imagination or sympathies, so as to be led into an unjust or oppressive assessment. It is difficult to see how more precise instructions could have been given. The assessment was not left to the ungoverned and unlimited discretion of the jury. It may be and it probably is the fact that the damages found were excessive and quite unreasonable. There must always be danger of such assessments, if a jury is at liberty to fix a valuation upon something that cannot be valued. But this is irremediable

by us. The only palliation that remains in such a case (it is not a cure), is the free exercise of the power which the Court of Common Pleas has to grant new trials.

The judgment is affirmed.

CHICAGO AND ALTON RAILROAD *v.* FLAGG.

Illinois, 1867. 43 Ill. 364.

Lawrence, J.[1] This was an action on the case brought by the appellee against the railway company for wrongfully expelling him from one of its trains. It was urged that, as the conductor acted in good faith, and without violence or insult, and there is no proof of actual damage to the plaintiff, the verdict should have been for only nominal damages. The verdict was for one hundred dollars. It was after dark when this affair occurred, and the plaintiff was lame and had two bundles that seemed to be heavy. In order to reach the station or village, he had to pass over a covered railway bridge which spanned a stream, and which he had to cross by means of a plank walk or foot-path, about three feet wide, laid down upon the timbers. The only light came from below, and from the ends of the bridge. For a stranger laden with bundles, to be compelled to walk through a dark railway bridge at night, on a narrow path, uncertain as to when a train may come, and liable to be crushed if one does come, is certainly not a desirable experience. The jury had the right to take these things into consideration, and as the plaintiff himself had been guilty of no delinquency, and was anxious to pay his fare, and as his legal rights were violated in expelling him from the train, it was proper for the jury also to consider, not only the annoyance, vexation, delay and risk, to which he was subjected, but also the indignity done to him by the mere fact of expulsion. This case is widely different from that of the Chicago and Alton R. R. Co. *v.* Roberts, 40 Ill. 503. We cannot say the damages were excessive. *Judgment affirmed.*

[1] Part of the opinion is omitted.

BALTIMORE AND POTOMAC RAILROAD *v.* FIFTH BAPTIST CHURCH.

United States Supreme Court, 1883. 108 U. S. 317.

Action in the nature of an action on the case to recover damages for the discomfort occasioned by the establishment of a building for housing the locomotive engines of a railroad company contiguous to a building used for Sunday-schools and public worship by a religious society.

The court gave the following charge to the jury: —

"The congregation would be entitled to recover damages (although their property might have been increased in value) because of the inconvenience and discomfort they have suffered from the use of the shop. The congregation has the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort which is the primary consideration in allowing damages."

Field, J.[1] The instruction of the court as to the estimate of damages was correct. Mere depreciation of the property was not the only element for consideration. That might, indeed, be entirely disregarded. The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke, and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of

[1] Part of the opinion is omitted.

his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure. *Judgment affirmed.*

Section 2. — *Mental Suffering.*

MEREST *v.* HARVEY.

Common Pleas, 1814. 5 Taunt. 442.

Trespass for forcibly breaking and entering the plaintiff's close, called Brandon Road Breck, part of Longford Field, and with feet in walking, and with dogs, treading down and spoiling the plaintiff's grass, and with dogs and guns searching, hunting, and beating for game there, and doing other wrongs. The cause was tried before Heath, J., at the Norfolk spring assizes, 1814. The evidence was, that in September the plaintiff, a gentleman of fortune, was shooting on his own manor and estate, in a common field contiguous to the highway, when the defendant, a banker, a magistrate, and a Member of Parliament, who had dined and drank freely after taking the same diversion of shooting, passed along the road in his carriage, and, quitting it, went up to the plaintiff and told him he would join his party, which the plaintiff positively declined, inquired his name, and gave him notice not to sport on the plaintiff's land; but the defendant declared with an oath that he would shoot, and accordingly fired several times, upon the plaintiff's land, at the birds which the plaintiff found, proposed to borrow some shot of the plaintiff, when he had exhausted his own, and used very intemperate language, threatening, in his capacity of a magistrate, to commit the plaintiff, and defying him to bring any action. The witnesses described his conduct as being that

of a drunken or insane person. The plaintiff conducted himself with the utmost coolness and propriety. A special jury found a verdict for the plaintiff for the whole damages in the declaration, £500; which verdict

Bloffet, Sergt., now moved to set aside for excess; for, he said, the defendant's conduct must have proceeded from intoxication or insanity, as it was described by the witnesses; the jury seemed to have considered, not what they ought to give as a compensation for the injury sustained, but what they, as lords of manors in a sporting county, where the jealousy of preserving the game was carried to an excess, should like to receive in similar circumstances.

Gibbs, C.J. I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, "Here is a halfpenny for you, which is the full extent of all the mischief I have done?" Would that be a compensation? I cannot say that it would be.

Heath, J. I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. There was not one country gentleman in a hundred, who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages.

Rule refused.

CANNING *v.* WILLIAMSTOWN.

Massachusetts, 1848. 1 Cush. 451.

This was an action on the case to recover damages for an injury sustained by the plaintiff, in consequence of a defect in a bridge in the town of Williamstown.[1]

Metcalf, J. The Rev. Sts. c. 25, § 22, provide, that if any person "shall receive any injury in his person," by reason of any defect or want of repair in a road, he may recover of the party, that is by law obliged to repair the road, the amount of damage sustained by such injury.

The argument for the defendants assumes that the plaintiff sustained no injury in his person, within the meaning of the statute, but merely incurred risk and peril, which caused fright and mental suffering. If such were the fact, the verdict would be contrary to law. But we must suppose that the jury, under the instructions given to them, found that the plaintiff received an injury in his person — a bodily injury — and that they did not return their verdict for damages sustained by mere mental suffering caused by the risk and peril which he incurred. And though that bodily injury may have been very small, yet if it was a ground of action, within the statute, and caused mental suffering to the plaintiff, that suffering was a part of the injury for which he was entitled to damages.

We are of opinion, that there was no error in the instructions; and we cannot presume that they were misunderstood or disregarded by the jury.[2]

Exceptions overruled.

[1] The statement of facts is omitted.

[2] A *dictum* of Lord Wensleydale in Lynch *v.* Knight, 9 H. L. Cas. 577, 598, is often quoted in connection with the principal case. Lynch *v.* Knight was an action of slander for charging the plaintiff with unchastity, whereby she lost the *consortium* of her husband. The House of Lords refused to allow the action, on the ground that the loss of *consortium* did

BALLOU *v.* FARNUM.

Massachusetts, 1865. 11 Allen, 73.

Colt, J.[1] The plaintiff in this action is entitled to recover as damages compensation for all such personal injury to him as was the necessary and proximate consequence of the alleged wrongful act of the defendants, and for such other injury as was the direct and natural, though not the necessary consequence thereof, and which is specially alleged in his declaration. It is averred that, being a manufacturer, before the accident able to earn large sums of money, he was by the injury rendered unable to labor in and conduct his business. No objection was taken to the form of the allegation, and it is to be regarded as a sufficient statement that the injury had produced a diminution of capacity, either mental or physical or both. For the purpose of proving the extent of the injury, the plaintiff was permitted to introduce evidence to show his previous occupation as a manufacturer, the nature of the duties he was accustomed to perform, and that since the accident he was able to do very little that required mental appli-

not follow naturally from the words spoken. Lord Wensleydale also suggested a doubt whether the loss of *consortium* of a husband was such special damage as would suffice to give an action of slander, since the husband was still holden for her support and the loss was therefore not a pecuniary one. In the course of this argument he said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested. For instance, where a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant, the loss of whose service is a material damage which a jury has to estimate; when juries estimate that, they usually cannot avoid considering the injured honor and wounded feelings of the parent."

[1] Part of the opinion is omitted.

cation or physical labor; and it is now insisted that this evidence was improperly admitted. It is said that if the jury were permitted to take into consideration as an element of damage the loss of intellectual power and capacity of the plaintiff for business, the inquiry must of necessity include an estimate of the future profits of the business in which the plaintiff was or might thereafter be engaged; that such an estimate can furnish no safe basis for fixing the compensation, and must at best be conjectural and uncertain.

In general the profits of a future business are indeed too remote and uncertain to be relied on as an element in the estimate of damages. It does not follow that superior education, experience or ability in the management of business insures pecuniary success. The uncertainty of the continuance of health and life, with the taste and disposition for such pursuits, and especially the proverbial uncertainty of trade, preclude the making of any estimate which can have weight beyond the merest conjecture. If this evidence had been offered by the plaintiff with a view of increasing the damages on account of his wealth or peculiar skill as a manufacturer, or the large profits he would be able to realize in his future business, and it had been admitted for that purpose, the argument of the defendant would be entitled to further consideration. But it was offered only to show the extent of the personal injury by reason of the loss of mental vigor and endurance thereby occasioned. The diminution, whatever it was, could only be shown by evidence of strength before and weakness afterwards as manifested in the ordinary pursuits of the plaintiff. The presiding judge admitted it only for this restricted purpose, and carefully instructed the jury that it was admissible only in order to enable them to judge of the injury to his capacity, and that the action was for an injury to the man, and not for interfering with his business.

In all actions of this description, and particularly in those in which damages for mental suffering or loss of mental capacity are sought to be recovered, the difficulty of furnishing by evidence the means of measuring the extent of the injury, so

that the jury may be able to award with any certainty a pecuniary equivalent therefor, is at once apparent; and in this difficulty the defendants find argument for the support of their objection. But the answer is, that the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree. In a variety of actions founded on personal torts, and in many where no positive bodily harm has been inflicted, the plaintiff is permitted to recover for injury to the feelings and affections, for mental anxiety, personal insult, and that wounded sensibility which follows the invasion of a large class of personal rights. The impossibility, in all such cases, of precisely appreciating in money mental suffering of this description is certainly as great as is suggested where the question is what shall be allowed for a permanent injury to mental capacity. The compensation for personal injury occasioned by the negligence or misconduct of others, which the law promises, is indemnity, so far as it may be afforded in money, for the loss and damage which the man has suffered as a man. Some of its elements may be bodily pain, mutilation, loss of time and outlay of money; but of more important consideration oftentimes is the mental suffering and loss of capacity which ensues. Of these several items of injury, if compensation is to be confined to those capable of accurate estimate, it will include but a small part, and must exclude all those injuries commonly regarded as purely physical; for the difficulty in ascertaining a pecuniary equivalent for the last named is precisely the same and quite as great as any that have been suggested. In fact, it will be found impossible to fix a limit to injuries of a physical nature so as to exclude from consideration their effect on the mental organization of the sufferer. The intimate union of the mental and physical, the mutual dependence of each organization — if indeed, for any practical purpose in this regard, they can be considered as distinct — the direct and mysterious sympathy that exists whenever the sound and healthy condition of either is disturbed, render useless any attempt to separate them for the purpose indicated. It is obvious,

upon a moment's reflection, that the powers and usefulness of the limbs and senses in ministering to the necessities and pleasures of the individual are to a great extent to be measured by the knowledge, experience, and taste, which he possesses, and which are purely qualities of the mind. Take the case of an injury to the right arm of a skilful painter or musician, for example. To show the extent of his injury, the plaintiff produces evidence of the use he was able to make of the arm before and after the accident. From such evidence alone could the jury judge of the plaintiff's loss. Such proof is constantly resorted to without objection in these cases. And still the chief value of the limb to its possessor consists in its skilful use, as controlled and directed by the cultivated taste and education of the plaintiff; and the chief loss to him is the loss of the power to make these purely intellectual endowments available for his pleasure or benefit. Or suppose the injury be to one of the five senses. Can any rule be adopted which shall limit the damages to that portion of the injury suffered which may be called only bodily?

There is a class of injuries, especially those which affect the brain and nervous system, to which this case seems to have belonged, where, by common observation, the most satisfactory symptom and proof of the physical injury is to be found in the weakness and derangement of the intellectual faculties. Upon the whole, then, upon principle we can see no error in the admission of the evidence, with the accompanying instructions. In the main it must always be left to the discretion of the jury to give such reasonable damages in these cases as in their opinion will afford compensation for the entire injury which the plaintiff proves he has sustained, subject to that power which remains in the court to set aside the verdict in those cases where the damages awarded are so excessive as to warrant the inference that some passion or prejudice or other improper considerations influenced them.

MEAGHER *v.* DRISCOLL.

Massachusetts, 1868. 99 Mass. 281.

Tort in the nature of trespass *quare clausum fregit* for the removal of the remains of the plaintiff's deceased child from Lot No. 4 in Holyhood Cemetery in Brookline. The judge ruled that if it appeared that the defendant had acted in the removal of the body of the child, either with a wilful disregard of the plaintiff's rights, or under a mistake arising from gross carelessness and want of ordinary attention or diligence in making proper inquiry, and with the opportunity, by means of his records or by inquiry, to know that the plaintiff had paid for the lot, the jury in assessing damages would have a right to consider the injury to the plaintiff's feelings, and would not be restricted to the mere pecuniary loss or damage to his property.

The jury returned a verdict for the plaintiff, assessing damages in the sum of $837.50; and the defendant alleged exceptions.[1]

Foster, J. The measure of damages was correctly stated. The gist of the action is the breaking and entering of the plaintiff's close. But the circumstances which accompany and give character to a trespass may always be shown either in aggravation or mitigation. Bracegirdle *v.* Orford, 2 M. & S. 77. Merest *v.* Harvey, 5 Taunt. 442. Brewer *v.* Dew, 11 M. & W. 625. He who is guilty of a wilful trespass, or one characterized by gross carelessness and want of ordinary attention to the rights of another, is bound to make full compensation. Under such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort. Acts of gross carelessness, as well as those of wilful mischief, often inflict a serious wound upon the feelings, when the

[1] Part of the statement of facts and of the opinion are omitted.

injury done to property is comparatively trifling. We know of no rule of law which requires the mental suffering of the plaintiff, or the misconduct of the defendant, to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness.

Exceptions overruled.

VOGEL *v.* McAULIFFE.

Rhode Island, 1895. 31 Atl. Rep. 1.

Action on the case for damages caused by defendant wrongfully neglecting to replace a furnace belonging to premises leased by plaintiff, which defendant had taken down.[1]

Tillinghast, J. We do not think the court erred in admitting the testimony offered by the plaintiff as to the condition of his infant child at the time of and immediately following the destruction of his furnace. The child was ill with bronchitis, and on account of the destruction of the furnace had to be taken into the kitchen and cared for there, which, according to the testimony, was not so convenient or suitable a place as it had previously occupied. And although it does not appear that any injury was sustained by the child on account of the change, yet the plaintiff was annoyed and subjected to more or less mental suffering and anxiety by reason thereof.

[1] Only so much of the case as discusses damages for mental suffering is given.

SWIFT *v.* DICKERMAN.

Connecticut, 1863. 31 Conn. 285.

SANFORD, J.[1] This is an action for words spoken, which impute to the plaintiff, a practising physician and surgeon, the want of professional knowledge and skill. The charge that "if the jury should find that the slanders had injured the plaintiff's character and position they might take into consideration his anxiety and suffering on that account," was right.

It is true that the words spoken relate only to the plaintiff's professional character and are aimed especially at his pecuniary interests dependent upon his professional calling and employment. But the natural if not the necessary effect of professional degradation and disgrace is personal anxiety and suffering on account of it. And that anxiety and suffering were proper subjects for compensation to the plaintiff, and ought to be atoned for by the defendant.

There is, and there ought to be, no other rule upon the subject, than that a tort-feasor shall be held responsible in damages for the full amount of all the immediate injury occasioned by his wrongful act. This rule was adopted by the Superior Court and sanctioned by this court in the recent case of Lawrence *v.* Housatonic R. R. Co., 29 Conn. 390, in that of Seger *v.* Barkhampsted, 22 Conn. 290, and in many other cases.

It is difficult to conceive how a member of either of the learned professions can be injured in his professional character without being at the same time subjected to anxiety and mental suffering,— suffering on account of apprehended professional dishonor, to be followed as it naturally and almost necessarily is, and *always ought to be*, by social degradation and disgrace, and the ultimate loss of professional employ-

[1] Part of the opinion is omitted.

ment with its honors and emoluments. Bodily pain comprises but a very small part of the suffering endured by rational beings, and the injuries which the calumniator inflicts act, often entirely and always immediately, upon the mental sensibilities of his victim. Mental suffering, then, constitutes an important element in the calculation of compensation to be made for such an injury.

A new trial should be denied.

WADSWORTH *v.* WESTERN UNION TEL. CO.

Tennessee, 1888. 86 Tenn. 695.

CALDWELL, J.[1] This suit was brought in the Circuit Court at Memphis, by Mrs. Jennie H. Wadsworth and her husband, T. J. Wadsworth, against the Western Union Telegraph Company, for failing to promptly deliver to her the following telegraphic messages: "MEMPHIS, October 2, 1887. *To Mrs. T. J. Wadsworth, Byhalia, Miss.:* Your brother, Billie Howell, is in a dying condition at 105 Jefferson St. R. C. WALDEN." And: "MEMPHIS, October 3, 1887. *To Mrs. T. J. Wadsworth, Byhalia, Miss.:* Mr. Howell died this morning. Advise us what to do. Will look for some one on morning train. R. C. WALDEN." It is averred in the declaration that Byhalia is about 28 miles from Memphis, and that the two places are connected by direct line of telegraphic wire and railroad; that Billie Howell, a brother of Mrs. Wadsworth, one of the plaintiffs, was "seized with a mortal malady," in the city of Memphis, on the 2d day of October, 1887, and that, at about the hour of 7 o'clock P. M. of that day, R. C. Walden, a "friend of the family," presented to the defendant the former of the messages just set out, written upon one of its day or full-rate blanks, and that it was accepted by the defendant for immediate transmission and delivery to her; that through the gross, wanton, and reckless negligence of the defendant, and in palpable violation of its duty, the

[1] Part of the opinion is omitted.

message was by the defendant detained, and not delivered until about 11.30 o'clock A. M. of the next day, and several hours after the death of Howell; that he died about 6.30 o'clock A. M. on the 3d of October, 1887, and a few moments thereafter the second of said telegrams was presented and accepted for immediate transmission and delivery, as was the other one, and that, through the same gross, wanton, and reckless negligence of the defendant, this second message was detained, and not delivered by the defendant, until about the same time the other one was delivered; that, by reason of this negligence and breach of duty on the part of the defendant, Mrs. Wadsworth was prevented from attending her dying brother and administering to him in his last hours, and also from making desired preparations for his interment; that the messages were sent at her expense; and that she paid full toll therefor, — "to her damage ten thousand dollars." Demurrer was sustained, and the suit dismissed. Plaintiffs have appealed in error.

The first assignment of demurrer is that the declaration shows no cause of action, in that it avers no pecuniary damage or personal injury; that mental suffering, unaccompanied by pecuniary injury, will not sustain an action. Clearly, the declaration discloses a case for some damage; and to this extent, it must be conceded, the action in sustaining the demurrer was erroneous. The messages in question were couched in decent language, and were lawful in their purpose. Such being true, Walden had a legal right to send them, and Mrs. Wadsworth a legal right to receive them; and it was the plain duty of the defendant to deliver them promptly. Its dereliction of duty, and violation of her legal right, as averred in the declaration, and confessed in the demurrer, unquestionably gave her a right of action. "Every infraction of a legal right, in contemplation of law, causes injury. This is practically and legally an incontrovertible proposition. If the infraction is established, the conclusion of damages inevitably follows." 1 Suth. Dam. 2.

But the question most debated at the bar by learned coun-

sel, and the one of most importance and interest in this case, is whether or not injury to the feelings, anguish, and pain of mind, occasioned by the defendant's breach of duty to Mrs. Wadsworth, can be regarded as an element of damage, under the law. In actions for personal injury, the general rule, which is too familiar to admit of citations of authority to sustain it, is that both bodily pain, and mental suffering connected therewith, are to be considered by the jury in estimating the amount of damage sustained, and the sum to be recovered by the plaintiff. Upon the latter element, it is very truthfully and appropriately remarked by a learned author that "the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed the sufferings of each frequently, if not usually, act reciprocally on the other." 3 Suth. Dam. 260. After laying down the rule as we have stated it to be, and citing some of the very many decisions adopting it, Mr. Wood says: "But we do not apprehend that the rule has any such force as to enable a person to maintain an action where the only injury is mental suffering, as might be thought from a reading of the loose *dicta* and statements of the court in some of the cases. So far as I have been able to ascertain the force of the rule, the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced." Wood's Mayne, Dam. 74, note. On same subject Mr. Cooley says: "But in this country, as well as in England, the ground of recovery must be something besides an injury to the feelings and affections, or the loss of the pleasure and comfort of the society of the person killed. There must be a loss to the claimant that is capable of being measured by a pecuniary standard." Cooley, Torts, 271. These are the strongest statements of the rule contended for by the defendant which we have seen, and to them we give our full approval when applied to the

class of cases with respect to which they are made. But they are applicable peculiarly, not to say exclusively, to actions for injury to the person where physical injury is the sole ground of the action, and without which the action will not lie at all. This, however, is an action, on the facts of the case, which is permissible under our Code, and may include all matters embraced in an action *ex delicto*, and also those proper to be considered in an action *ex contractu*. The plaintiff, having a clear right of action for some damage, as we have already seen, may maintain her action, and recover all the damage she may show herself to have sustained by reason of the wrongful act of the defendant; and, in ascertaining the amount thereof, all proven elements of damage, admissible in either form of action, are for the consideration of the jury. In an action for tort the injured party may recover such damages as result proximately and naturally from the wrongful act of the defendant, and also exemplary damages where the act was done with malice, or under circumstances of aggravation; and, in an action, for breach of contract, the measure of the damages recoverable is, generally, the loss which the contracting parties, with all the facts before them, would have contemplated as flowing directly from its breach. 2 Thomp. Neg. 849; Gray, Tel. 146. The latter author, on the next page, says: "Neither in an action of tort nor in one of contract can a party recover damages for mental anguish alone. He can recover such damages, in consonance with the foregoing rules, at least, only where he is entitled to recover some damages on another ground." There is a large class of actions for tort in which substantial recoveries are authorized and sustained for injury to the feelings of the person suing where the other damage is nominal merely. As instances of such actions, we mention the case of a husband suing for an injury to his wife, or for seducing or enticing her away from him, and that of a parent suing for the seduction of the daughter. In all these cases, the main element of damage, the real injury sustained, is the wound to the feelings; the loss of service upon which the

actions are technically based being but a legal fiction, and more imaginary than real. Love v. Mosoner, 6 Baxt. 27; Parker v. Meek, 3 Sneed, 30; Maguinay v. Saudek, 5 Sneed, 147; Cooley, Torts, 224, 226, 231; 3 Suth. Dam. 744. With respect to actions for breach of contract, Mr. Sutherland asks the question, "May damages for breach of contract include other than pecuniary elements?" and then he proceeds to say: "In actions upon contract, the losses sustained do not, by reason of the nature of the transactions which they involve, embrace, ordinarily, any other than pecuniary elements. There is, however, no reason why other natural and direct injuries might not justify and require compensation. Contracts are not often made for a purpose, the defeating or impairing of which can, in a legal sense, inflict a direct and natural injury to the feelings of the injured party. A breach of promise of marriage is an instance of such a contract, and such considerations enter into the estimate of the damages. The action for such a cause is often referred to as an exceptional action. In a certain sense it is so; but in the particular under consideration it is only peculiar. It is an action upon contract, and the damages allowed are such as, considering the nature and benefits of the thing promised, will be adequate compensation." 1 Suth. Dam. 156, 157. To further illustrate and answer his question, the same author says: "Where a contract is made to secure exemption from a particular inconvenience or annoyance, or to confer a particular enjoyment, the breach, so far as it disappoints in respect to that purpose, may give a right to damages appropriate to the objects of the contract." Id. 157, 158.

These are but illustrations and applications of the general rule which we have already stated for the estimation of damages in actions for breach of contract. They serve the purpose of showing that, in the ordinary contract, only pecuniary benefits are contemplated by the contracting parties; and that, therefore, the damages resulting from the breach of such a contract must be measured by pecuniary standards; and that, where other than pecuniary benefits are contracted for,

other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach. The case before us (so far as it is an action for breach of contract) is subject to the same general rule; and the defendant is answerable in damages for the breach according to the nature of the contract, and the character and extent of the injury suffered by reason of its non-performance. The messages were sent for a particular purpose, which was disclosed upon their face, and of which the defendant had full notice. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell anything; no proposition or promise with respect to any business transaction. The messages were of far greater importance to the receiver than any of these. Her brother was lying at the point of death, in easy reach of her. It was information of this fact that the defendant first undertook to convey to her for a stipulated sum, and which, if conveyed promptly, would have enabled her to be with him in his last moments, and would have saved her the injury of which she complains. Then her brother died away from her; his body needed her attention, and would have received it, as owned, if the defendant had done its duty. It was intelligence of the death which the defendant agreed, in the second place, to communicate to her. The messages were proper in language, and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits be mainly or altogether to the feelings and affections. The defendant contracted that she should have those benefits, and that she should be spared whatever pain and anguish such information, promptly conveyed, would prevent. By all the authorities, including our Code, it was the duty of the defendant to transmit and deliver these messages "correctly, and without unreasonable delay;" and, in failing to do so, it became responsible for all loss or injury occasioned thereby. Code Mill. & V. §§ 1541, 1542; Marr *v.* Telegraph Co., 1 Pickle, 529, 3 S. W. Rep. 496; Gray, Tel. §§ 81, 82, *et seq.*; Cooley, Torts, 646,

647; Whart. Neg. § 767; 3 Suth. Dam. 298–300; Shear. & R. Neg. § 605. This rule of damages is enforced by the Supreme Courts of Georgia, Virginia, and other States, even where the message is in cipher. Telegraph Co. *v.* Fatman, 73 Ga. 285, 54 Amer. Rep. 877; Telegraph Co. *v.* Reynolds, 77 Va. 173, 46 Amer. Rep. 715, and reporter's note at end of case. It is true that most of the adjudged cases in which telegraph companies have been required to respond in damages for their negligence have involved questions of pecuniary loss; but we cannot agree that for that reason the liability should attach and be enforced in such cases only. Telegraphy is of comparatively recent origin, and the law concerning the duties and liabilities of telegraph companies has hardly passed its infancy, and cannot be expected, at so early a day in its history, to be settled, even in its important parts, by a long line of concurring decisions.

In addition to this, it is but reasonable to presume that such a flagrant breach of plain obligation, with respect to matters so near the heart and so accustomed to the respect of all mankind, as is here averred, has but seldom occurred, and therefore has but seldom been brought to the attention of the courts of the country. To hold that the defendant is not liable, in this case, for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default, would be to disregard the purpose of the telegrams altogether, and to violate that rule of law which authorizes a recovery of damages appropriate to the objects of the contracts broken; and, furthermore, such a holding would justify the conclusion that the defendant might with impunity have refused to receive and transmit such messages at all, and that it has the right in the future to do as it has done in this case, or, at least, that it cannot be required to respond in damages for doing so. To such a result we think no court should submit. The telegraph company is the servant, rather than the master, of its patrons. It is their prerogative to determine what messages they will present; and, so they are lawful, it is bound by law, upon payment of its toll, to transmit and de-

liver them correctly and promptly. It has no right to say what is important, and what is not; what will be profitable to the receiver, and what will not; what has a pecuniary value, and what has not; but its single and plain duty is to make the transmission and delivery with promptitude and accuracy. When that is done, its responsibility is ended. When it is omitted, through negligence, the company must answer for all injury resulting, whether to the feelings or to the purse, one or both, subject alone to the proviso that the injury be the natural and direct consequence of the negligent act.

Lurton and Folkes, JJ., dissenting.

WESTERN UNION TEL. CO. *v.* ROGERS.

Mississippi, 1891. 68 Miss. 748.

Cooper, J. A telegram was sent from Chattanooga, Tenn., to the plaintiff, who resides in Meridian, informing him of the death of his brother, and the time and place at which he would be buried. If this despatch had been seasonably delivered, the plaintiff could and would have attended the burial. By negligence of the agent of the defendant company at Meridian, it was not delivered until after the last train had left Meridian for Chattanooga, by which the plaintiff could have travelled to attend the funeral services. This suit was brought to recover the damages sustained by the plaintiff by reason of the non-delivery of the message. The facts are undisputed. They are that the message was sent, and its transmission paid for by the sender; that it was by the negligence of the agent not delivered; that the plaintiff sustained no pecuniary loss, his damages being merely nominal, unless he is entitled to recovery for the disappointment of not being informed of the death of his brother in time to attend his burial. The court below instructed the jury that the plaintiff was entitled to recover as compensation damages for the mental suffering

sustained by him by reason of being deprived of the privilege of attending the funeral of his brother, it being conceded that no such negligence was shown as would warrant the infliction of punitive damages. The jury returned a verdict for $800, and from a judgment thereon the defendant appeals. It thus appears that the single question presented is whether, under the circumstances named, damages for mental suffering may be recovered. It is immaterial, in the determination of the question involved, whether the action be considered as one for the breach of the contract to transmit and deliver the message, or as an action on the case for the tort in failing to perform the duty devolved on the telegraph company under the contract. The substance and nature of the default and the consequent injury are the same in either view, and, in the absence of circumstances warranting the imposition of punitory damages, the measure of damages must be the same, whatever be the form of the action. We have given to the investigation of the question that consideration which its importance demands, and, though the right of the plaintiff to recover the damages awarded in this case finds support in the decisions of several of the States, we are unwilling to depart from the long-established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering, disconnected from physical injury, and not the result of the wilful wrong of the defendant. That such damages are recoverable in actions for breach of contract of marriage is well settled; but it is equally true that until recent years this action stood as the marked and single exception in which such damages were recoverable in actions for breach of contract. This action, though in form one for the breach of contract, partakes in several features the characteristics of an action for the wilful tort, and, though the damages recoverable by the plaintiff for mental suffering are spoken of as compensatory, the fervent language of the courts indicates how shadowy is the line that separates them from those strictly punitory. Harrison *v.* Swift, 13 Allen, 142; Kurtz *v.* Frank, 76 Ind. 595; Thorn *v.* Knapp, 42 N. Y. 475;

Johnson *v.* Jenkins, 24 N. Y. 252; Coryell *v.* Colbaugh, 1 N. J. Law, 77. So much, indeed, does the motive of the defendant enter into the question of damages that in Johnson *v.* Jenkins he was permitted to give in evidence, in mitigation of damages, the fact that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health. . . .

It is upon the suggestions of the text-writers, supported by authorities which have been given a strained construction, and upon a misapplication of the rule that damages for a breach of contract are commensurate with the injury contemplated by the parties, that some courts in recent years have decided that mental pain and anguish, disconnected from physical injury, furnish a substantive cause of action for which recovery may be had.

The principle of limitation applied by the courts in cases involving pecuniary loss, for the necessary protection of defendants against ruin by the infliction of speculative and remote damages, has been perverted, and accepted as the standard of measurement of damages in a class of cases in which the sole injury sustained is confessedly incapable of compensation, and in which any damages awarded must, from the nature of things, be purely speculative and uncertain. In 1881, in the case of So Relle *v.* Telegraph Co., 55 Tex. 308, the Supreme Court of Texas, relying upon the authority of two previous decisions in that State (Hays *v.* Railroad Co., 46 Tex. 279, and Railroad Co. *v.* Randall, 50 Tex. 261), in one of which an assault and battery had been committed on the passenger, and in the other serious and permanent physical injury had been suffered, for which damages for mental pain and anguish had been allowed, and upon a suggestion in the text of Shearman & Redfield on Negligence, unsupported by any authority, decided that the sendee of a message might recover from the company, as compensatory damages, for mental suffering caused by its failure to promptly deliver a message which announced to him the death of his mother, by reason of which default he

was not informed of her death and failed to attend her funeral. This decision has been since overruled, upon a subordinate point, but the general proposition thereby established, that mental suffering, disconnected from physical injury, may be compensated for in actions for breach of contract, has been since repeatedly reaffirmed. Railroad Co. *v.* Levy, 59 Tex. 542, 563; Stuart *v.* Telegraph Co., 66 Tex. 580; McAllen *v.* Telegraph Co., 70 Tex. 243; Telegraph Co. *v.* Cooper, 71 Tex. 507; Loper *v.* Telegraph Co., 70 Tex. 689; Telegraph Co. *v.* Simpson, 73 Tex. 422; Telegraph Co. *v.* Adams, 75 Tex. 537; Telegraph Co. *v.* Feegles, 75 Tex. 537; Telegraph Co. *v.* Moore, 76 Tex. 67; Telegraph Co. *v.* Broesche, 72 Tex. 651. The courts of Alabama, Tennessee, Indiana, and Kentucky have followed the Supreme Court of Texas, relying upon the decisions above noted as authority. Telegraph Co. *v.* Henderson, 89 Ala. 510; Wadsworth *v.* Telegraph Co., 86 Tenn. 695; Reese *v.* Telegraph Co., 123 Ind. 295; Chapman *v.* Telegraph Co., 90 Ky. 265. These cases, so far as we have been able to discover, rest upon the authority of each other, finding no support in the decisions of the other States, nor those of England.

In actions for injuries sustained by the negligence of the defendant, where serious bodily harm has resulted, the generally accepted rule is that the jury may, and, since it is impossible to draw the line between physical pain and mental suffering in such instances, must, give damages for both. Expressions used by the courts as argument or illustration in those cases, in which damages for mental suffering are recoverable because such suffering is declared to be inseparable from physical pain and injury, have been seized upon as sustaining a right of action for mental suffering alone, or for such suffering coupled with the right in the plaintiff to merely nominal damages. Damages for mental suffering have been very generally allowed in three classes of cases: (1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are compensatory, and the reason given for their allowance by all the

courts is that the one cannot be separated from the other. (2) In actions for breach of contract of marriage. (3) In cases of wilful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party. The decisions in Texas, Tennessee, Kentucky, Indiana, and Alabama rest upon arguments and illustrations drawn from cases of one or the other of these classes, or upon the general proposition that damages must in all cases be commensurate with the injury sustained to the extent that they were in the contemplation of the parties to a contract, or should have been foreseen as the probable consequences of his conduct by the negligent defendant. These decisions are not in our opinion sustained by any of the analogies by which they are sought to be supported. These cases are totally different from those in which damages for mental suffering have been allowed, and it is notable that in no one of them is there a citation of a single case, decided prior to the case of So Relle, in which an action for breach of contract (except actions for breach of contract of marriage), or in an action on the case for injuries resulting from mere negligence, damages were allowed for mental pain disconnected from physical injury. There is an absence of authority upon the direct question of the right of recovery for mere grief or disappointment, probably for the reason that prior to the So Relle case the bar had not entertained the view that an action therefor could be maintained, but there are several cases in which responsibility for mental disturbance by reason of fright has been considered. It has been held that fright attending an accident, resulting from negligence by which bodily injury was sustained, was properly considered by the jury in awarding damages. Seger *v.* Town of Barkhamsted, 22 Conn. 290; Masters *v.* Town of Warren, 27 Conn. 293; Cooper *v.* Mullins, 30 Ga. 146; Canning *v.* Williamstown, 1 Cush. 451. But where there is no bodily injury damages for fright should not be given. Canning *v.* Williamstown; Commissioners *v.* Coultas, L. R. 13 App. Cas. 222; Wyman *v.* Leavitt, 71 Me. 227; Lynch

v. Knight, 9 H. L. Cas. 577, 598. In Flemington v. Smithers, 2 Car. & P. 292, the plaintiff sued to recover for injuries inflicted upon his minor son and servant by the negligence of the defendant, and claimed compensation for the injury to his parental feelings, but the claim was rejected. We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he has sustained. "Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." Lynch v. Knight, 9 H. L. Cas. 577.

The rapid multiplication of cases of this character in the State of Texas since the case of So Relle indicates, to some extent, the field of speculative litigation opened up by that decision. The course of decision shows how difficult the subject is of control. In So Relle's case it was held that the sendee of the undelivered message, who had paid nothing for its transmission, might recover for the mental suffering flowing from its non-delivery. In Railroad Co. v. Levy, 59 Tex. 564, that case was overruled, in so far as the right of action was recognized in the sendee, and it was held that only the person entering into the contract with the company might sue. But in Telegraph Co. v. Cooper, 71 Tex. 507, where the husband had sent the despatch calling a physician to attend his wife in her confinement, it was held that the husband (the sender of the message) could not recover for his mental suffering caused by the negligence of the company in failing to deliver the message, but that, suing in right of

his wife (who was not a party to the contract with the company), he might recover for her mental suffering. It is held in that State that the telegraph company must be informed, either by the face of the message or by extraneous notice, of the relationship of the parties and the purport of the message, to warrant the recovery of damages for mental suffering. It has been decided that this despatch did not sufficiently indicate these facts: "Willie died yesterday at six o'clock; will be buried at Marshall, Sunday evening" (Telegraph Co. *v.* Brown, 71 Tex. 723), while the following one did, "Billie is very low; come at once" (Telegraph Co. *v.* Moore, 76 Tex. 66). And a distinction seems to be drawn between the negligence of failing to deliver a despatch which causes mental pain and suffering and failing to deliver one which, if delivered, would relieve such suffering. In Rowell *v.* Telegraph Co., 75 Tex. 26, the plaintiff and his wife had received information of the dangerous illness of her mother. Subsequently a despatch was sent containing information of the mother's improved condition. This despatch the company failed to deliver. Suit was brought, but recovery was denied, the court saying: "The demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases. But the cases are rare in which such emotion can be held to be an element of the damages resulting from the breach. For injury to feelings in such cases, the courts cannot give redress. Any other rule would result in intolerable litigation." The manifest effect of this decision is to deny to a party injured redress for mental suffering contemplated by the parties to the contract as the probable consequence of its breach. The distinction drawn by the court is so unsubstantial that it was evidently resorted to for the purpose of obstructing the tide of "intolerable litigation" flowing from the decisions following the So Relle case. Kentucky, Tennessee, Indiana, and Alabama have

but recently established the rule, the dangers and difficulties of which are becoming apparent in Texas. The "intolerable litigation" invited and appearing in Texas has not yet fairly commenced in those States. It will, however, appear in due time, and the courts will be forced to resort to refined limitations, as Texas has done, to restrict it. We prefer the safety afforded by the conservatism of the old law, as we understand it to be, and are of opinion that no recovery for mental suffering can be had under the circumstances of this case. Dorrah *v.* Railroad Co., 65 Miss. 14; Salina *v.* Trosper, 27 Kan. 544; West *v.* Telegraph Co., 39 Kan. 93; Russell *v.* Telegraph Co., 3 Dak. 315; Wyman *v.* Leavitt, 71 Me. 227; Lynch *v.* Knight, 9 H. L. Cas. 577; Commissioners *v.* Coultas, L. R. 13 App. Cas. 222; Railroad Co. *v.* Stables, 62 Ill. 313; Johnson *v.* Wells, 6 Nev. 224; 2 Greenl. Ev. § 267; Wood's Mayne, Dam. 73.

Reversed and remanded.

LARSON *v.* CHASE.

Minnesota, 1891. 47 Minn. 307.

MITCHELL, J.[1] This was an action for damages for the unlawful mutilation and dissection of the body of plaintiff's deceased husband. The complaint alleges that she was the person charged with the burial of the body, and entitled to the exclusive charge and control of the same. The only damages alleged are mental suffering and nervous shock. A demurrer to the complaint, as not stating a cause of action, was overruled, and the defendant appealed. . . .

Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation.

[1] Part of the opinion is omitted.

This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. Counsel cites the leading case of Lynch *v.* Knight, 9 H. L. Cas. 577–598. We think he is laboring under the same misconception of the meaning of the language used in that case into which courts have not infrequently fallen. Taking the language in connection with the question actually before the court, that case is not authority for defendant's position. It is unquestionably the law, as claimed by appellant, that "for the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest, of the party complaining. Neither one without the other is sufficient." This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But, where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental, — as, for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction substantial damages are allowed for mental sufferings, although there be no proof of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act

complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument. In Meagher *v.* Driscoll, 99 Mass. 281, where the defendant entered upon plaintiff's land, and dug up and removed the dead body of his child, it was held that plaintiff might recover compensation for the mental anguish caused thereby. It is true that in that case the court takes occasion to repeat the old saying that a dead body is not property, and makes the gist of the action the trespass upon plaintiff's land; but it would be a reproach to the law if a plaintiff's right to recover from mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead.

Order affirmed.

Section 3. — *Aggravation and Mitigation.*

GRABLE *v.* MARGRAVE.

Illinois, 1842. 4 Ill. 372.

Treat, J. This was an action of trespass on the case, instituted in the Gallatin Circuit Court, by Margrave against Grable, for the seduction of the daughter of Margrave. On the trial, the court permitted the plaintiff to introduce evidence in relation to the pecuniary ability of the defendant. The court also permitted the plaintiff to introduce evidence

tending to show that the plaintiff was a poor man, in a pecuniary point of view. To these decisions of the court, the defendant excepted, and judgment having passed against him, he now assigns them for error.

This action was originally given to the master, to enable him to recover damages for the loss of service occasioned by the seduction of his servant. He was restricted, in his recovery, to the damages resulting from the loss of service. The loss of service is still the legal foundation of the right to recover, and the father cannot maintain the action without averring in his declaration, and proving on the trial, that, from the consequences of the seduction, his daughter is less able to perform the duties of servant. But the rule of damages originally governing the action, has, for a long time, been so far extended, as to authorize the father to recover damages beyond the mere loss of service, and expenses consequent on the seduction. Lord Ellenborough, in the case of Irwin *v.* Dearman, 1 East, 24, says, however difficult it may be to reconcile to principle the giving of greater damages, the practice is become inveterate, and cannot now be shaken. In Tullidge *v.* Wade, 3 Wils. 18, Chief Justice Wilmot remarks, "Actions of this sort are brought for example's sake, and although the plaintiff's loss, in this case, may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages." The court, in Tillet-son *v.* Cheatham, 3 Johns. 56, quoting the foregoing decisions with approbation, says, "The actual pecuniary damages, in actions for defamation, as well as in other actions for torts, can rarely be computed, and are never the sole rule of assessment." And it has been repeatedly held, that, in this action, the father may recover not only the damages he has sustained, by the loss of service, and the payment of necessary expenses, but the jury may award him compensation for the dishonor and disgrace cast upon him and his family, and for the being deprived of the society and comfort of his daughter. In vindictive actions, and this is now regarded as one, the jury are always permitted to give damages, for the double purpose of

setting an example, and of punishing the wrong-doer. For these purposes, proof of the condition in life, and circumstances, as well of the father and his family as of the party committing the injury, is highly proper, and should be given to the jury, and considered by them in estimating the damages. 2 Wils. 206; 3 Johns. 56; 3 Stark. Ev. 1309; 4 Phil. Ev. 218.

The pecuniary ability of the defendant is peculiarly the proper subject of inquiry. If the jury are permitted to awe others, by way of the example, and to punish the defendant, his wealth and standing in society will, in a considerable degree, determine the amount of damages. A verdict which, as against one individual, would be sufficient for all purposes, would, as against another, be scarcely felt, by reason of the difference in their ability to respond in damages. The court, therefore, decided correctly, in admitting the evidence in relation to the pecuniary ability of the defendant. Upon the other point, we are clearly of the opinion the court decided right in admitting evidence showing the pecuniary condition of the plaintiff. This evidence does not go to the jury, as was stated in the argument, for the purpose of exciting their prejudices in favor of the plaintiff, because he is a poor man, but to enable them to understand fully the effect of the injury upon him, and to give him such damages as his peculiar condition in life and circumstances entitle him to receive. It is easily perceived how a poor man would be more seriously injured by the loss of the service of his daughter, and the payment of expenses necessarily incurred in consequence of her seduction, than the individual more favorably circumstanced as to property. With the one, the injury might, for a time, deprive him and his family of many of the necessaries and comforts of life; while, with the other, no such result would be produced.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

SAYRE *v.* SAYRE.

New Jersey Supreme Court, 1855. 1 Dutch. 235.

Green, C.J.[1] In an action for slanderous words charging the plaintiff with larceny, the defendant, on the trial, offered in evidence, in mitigation of damages, the general bad character of the plaintiff before and at the time of the alleged slander. The court admitted the evidence, so far as it related to the plaintiff's character for honesty and integrity, but rejected evidence of his general bad character. This constitutes the ground of error.

Two questions are necessarily involved in the determination of the error assigned, viz.: 1. Whether in an action of slander, evidence of the plaintiff's general bad character is admissible in mitigation of damages. 2. Whether such evidence, if admissible, is to be restricted to those particular traits of character involved in the slanderous words.

Evidence touching the plaintiff's character, in mitigation of damages, may be offered to show that the defendant merely repeated rumors that were in circulation, and that the slander was not wantonly originated by him; with the view of showing the *animus* with which the words were spoken, in order to diminish the extent, or to qualify the character of the defendant's malice, and thereby to diminish the damages. With this view the evidence was offered, and held by this court to be admissible, in Cook *v.* Barclay, 1 Penn. 169, and, with the same view, it has been frequently admitted in the English courts. Or the evidence may be offered to show that the plaintiff, being a man of bad character, is therefore entitled to less damages, on the ground that a person of disparaged fame is not entitled to the same measure of damages as one with an unblemished reputation. In this last aspect, the evidence in the present case is offered, viz., to show the value of the thing alleged to be injured.

[1] Part of each opinion is omitted.

Regarding it as a mere question of value, aside from technical principle, it is difficult to perceive on what ground the evidence can be excluded. The plaintiff brings his action to recover damages for an injury to his reputation; to the estimation in which he is held among his neighbors and acquaintances. This is the *gravamen* of the complaint; for this the jury are to assess damages. Upon what principle are these damages to be assessed; upon what scale are they to be graduated, except in reference to the value of the article injured?

The law assumes a good character to be of equal value to every man. It presumes that every man is "of good name and fame" until the contrary is proved. The plaintiff, therefore, is not put upon proof of his good character, or of its precise value. But is not the defendant entitled to show that the plaintiff's character is not good, that his reputation has sustained but little injury, and that, consequently, he is entitled to but small damages by way of reparation. If, in estimating damages, there be any distinction between the best and the worst character, the jury ought to be furnished with the means of making a proper estimate. To exclude the evidence is either to affirm that in the admeasurement of damages in actions of slander, there is no distinction between the most exalted character and the most debased, or, admitting the distinction, to maintain that the jury must form their estimate of character without evidence.

The defendant cannot, under the general issue, give in evidence the truth of the words spoken, because this is matter of justification, and constitutes a complete defence to the action. It is excluded, therefore, from being offered in evidence under the general issue by virtue of a technical rule of pleading, which requires matters of justification to be pleaded in bar of the action.

ELMER, J. Much diversity of opinion has prevailed in regard to the true grounds upon which damages may be given in actions for *torts*. Admitting, however, for the purposes of the present inquiry, without meaning to assume that this

opinion is correct, that punitive or exemplary damages are inadmissible, and that the damages in such cases must be confined to such as will be compensation, recompense, or satisfaction to the plaintiff, for the injury he has actually received from the defendant, and that no facts or circumstances can be proved, on either side, but such as aggravate or mitigate the injury itself; I think it is very clear, that where the injury complained of is one to the reputation of the party, as is the case in slander, the general character of both parties does necessarily affect the injury. The defendant's rank and influence in society, as increased by his wealth, his talents, or his office, will affect the extent of the injury he has inflicted, and are therefore proper subjects of inquiry. So the plaintiff's position in these respects is in like manner directly involved, and will depend more or less upon his general character in society. The object of his suit is not simply to vindicate his character on the point which has been assailed, by showing that the charge is false, as well as malicious, but to obtain such damages as will compensate, so far as damages can compensate, for the injury done to his feelings, and to his reputation in general. No tribunal can properly determine the extent of that injury, or approximate the proper damage, without being apprised of his true situation in life. It was held by the Supreme Court of North Carolina, in the case of Sample *v.* Wynn, 1 Busbee, 319, not cited on the argument, that the plaintiff was entitled to give evidence in chief of his general good character in aggravation, it being a general principle that good character ought to be presumed. The correctness of this decision may be doubted, but I am entirely satisfied that the defendant should be permitted to show plaintiff's bad general character in mitigation of the damages, upon the plea of not guilty, if he thinks proper to do so.

If character be involved in such a case, it is not merely character as to the matter of the charge, which is admitted by that plea to be false, but character in general. It is true that a case may be imagined where a false charge, affecting

character in some particular matter, may be as much, and possibly more injurious, and deserve heavier damages, because of the plaintiff's want of a good character in some other particular; but of this the jury must judge when the circumstances are fully before them. Ordinarily it will be otherwise. In general, a man who has really lost the respect of his fellows, because of a tainted reputation in any particular, will not suffer the same injury in feeling or otherwise by a slander, and is not entitled to the same amount of damages as one who has hitherto borne an irreproachable name. A man who, because he is universally esteemed a liar, is not admitted to the association of the truthful and virtuous, cannot suffer so much injury by being falsely charged as a thief, as one whose character had no such taint. A virtuous woman, moving in reputable society, will be very differently affected by the charge of larceny, from one whose associations are with the vile and profligate. And it is to be remembered that it is not the mere opinion of the witness that is to be sought, but his knowledge of the fact of the party's general character and reputation among his neighbors.

The argument most pressed on behalf of the defendant in error, in answer to this reasoning, was that one who has lost character in one particular has more need to vindicate it in others, and of course more claims on the law. But his right to the protection of the law is not questioned. His want of a good character is no justification of a slander. So far as a slander affects his feelings, and is injurious to him, he is entitled to complete indemnification, and if the damages may be legally punitive, to more than compensation. The single question involved is, not his right to ample redress, but the true measure of redress in a case where it is the person only, and not property, that has been assailed. Who and what the person is must necessarily come in question. In such cases, there can be no certain measure of damages; the jury are the proper judges of their extent. To arrive at this intelligently, they must not only be informed of the cir-

cumstances attending the speaking of the slanderous words, but of the standing and position of the parties. Whatever rule of evidence may be adopted by the court, the jury will instinctively think of these things, and be influenced by them. If made a subject of direct evidence upon the trial, they will be subject to the control and the comment of the court, instead of being, as otherwise they will be, a matter of speculation and surmise or of erroneous statement in the jury room.

Justices POTTS and VREDENBURGH concurred.

PALMER *v.* CROOK.

Massachusetts, 1856. 7 Gray, 418.

ACTION of tort for seducing the plaintiff's wife, and alienating her affections from him.[1]

At the trial in the Court of Common Pleas, before Byington, J., the defendant introduced the depositions of the wife's father and mother, tending to prove that the plaintiff had cruelly treated his wife, and neglected to provide for her, in consequence of which she had returned to her father's house before the time of the alleged seduction.

The judge also, upon the motion of the plaintiff, and against the defendant's objection, rejected other parts of the depositions, containing testimony to complaints made by the plaintiff's wife of his ill treatment of her prior to the alleged seduction.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

BIGELOW, J. The evidence was rightly rejected, as being wholly collateral and irrelevant to the issue, or as proving facts of which there was better evidence in existence, except those parts of the depositions which tended to show that the wife of the plaintiff complained of his ill treat-

[1] Part of the case is omitted.

ment of her prior to the alleged criminal intercourse with the defendant.

These were competent, and should have been admitted. In actions for criminal conversation, one of the principal grounds on which the husband is allowed to recover damages is, that by the wrongful act of the defendant he has been deprived of the confidence and affection of the wife. If the defendant invaded domestic peace, destroyed conjugal felicity, and by his solicitations alienated and seduced the wife's affections from a kind and tender husband, he inflicted a much more grievous wrong, and incurred a far heavier penalty in damages, than he would have done if love and harmony and affectionate intercourse had been previously impaired or lost, through the misconduct and cruel treatment of the husband.

The state of the wife's mind and feelings towards the husband before the alleged infidelity is therefore directly in issue, as bearing on the question of damages; and it may be shown, in the usual mode in which proof of such a fact is made in courts of law, by evidence of declarations and statements of the wife, indicating the condition of her affections towards her husband during their cohabitation and prior to the alleged seduction.

Exceptions sustained.

SMITH *v.* HOLCOMB.

Massachusetts, 1868. 99 Mass. 552.

Tort for assault and battery by blows on the plaintiff's head.[1] The court instructed the jury that the plaintiff, if entitled to recover at all, could recover for all the direct injurious results to him by reason of this assault, and could also recover for the insult and indignity inflicted upon him by reason of the blows given him by the defendant. The

[1] The statement of facts has been abridged, and part of the opinion omitted.

defendant excepted to so much of the instructions as related to the insult and indignity.

CHAPMAN, C.J. The insult and indignity inflicted upon a person by giving him a blow with anger, rudeness, or insolence, occasion mental suffering. In many cases they constitute the principal element of damage. They ought to be regarded as an aggravation of the tort, on the same ground that insult and indignity offered by the plaintiff to the defendant, which provoked the assault, may be given in evidence in mitigation of the damage. Even where there is no insult or indignity, mental suffering may be a ground of damage, in an action of tort for an injury to the person. Canning *v.* Williamstown, 1 Cush. 451.

Exceptions overruled.

CURRIER *v.* SWAN.

Maine, 1874. 63 Me. 323.

PETERS, J.[1] An affray took place between the plaintiff and one of the defendants, at a railroad depot in the afternoon, and on the evening of the same day that defendant with the others proceeded to the plaintiff's house, and inflicted violence upon him there. The defendants desired to show what took place in the afternoon, in mitigation of damages for the assault committed afterwards. The justice presiding admitted in evidence the fact that there had been an affray, but excluded evidence of the details of it.

The ruling, both as to the admission and exclusion of evidence, was right. The admission was right, because it was to show the object and purpose of the second assault, or the state of mind with which it was done. Otherwise, there would have been nothing to indicate to the jury but that the house was entered for the purpose of robbery and plunder, or something of the kind. The fact of a previous affray might have some weight upon the question of the amount of dam-

[1] Part of the opinion is omitted.

ages recoverable, and might legitimately be regarded as a part of the transaction to be investigated in this suit. But the further evidence, offered and excluded, was not fairly a part of the facts involved in this investigation. The assault complained of here was committed at another time and at another place, and mostly by other parties. It was immaterial whether the fault of the previous affray was in the one or the other party concerned. If the defendant was ever so right in the first affray, he should have resorted to proper legal remedies, and not assume to take the law into his own hands. If he is permitted to show the merits of the controversy in the afternoon, then the plaintiff would have as much right to show the provocation that led him into that affray, and the result would be, the trial of several causes in one; and, as said in Mathews *v.* Terry, 10 Conn. 459, "the jury would be distracted with a multiplicity of questions and issues." The early and leading case of Avery *v.* Ray, 1 Mass. 12, decided in 1812, has been recognized as a correct authority upon this subject, in most of the courts in this country, ever since. It has been invariably followed in Massachusetts, in many subsequent cases. Of course, the general principle there enunciated may be modified by controlling circumstances in other cases; as in Prentiss *v.* Shaw, 56 Me. 437, cited and much relied on by these defendants. That case was decided upon its peculiar facts. The evidence introduced in mitigation there was mainly to show the innocent intention of the parties sued. They supposed (as they claimed) that they were acting under an official right to act. They had received (although improperly) an order, from persons in authority, to make the arrest. Their own motive and good faith, in obeying the order, had much to do with the question as to how far punitive damages should be recovered. So in the case at bar, as much evidence was admitted as would fairly show what the motive of the defendants was in the assault committed by them, and with what coolness and deliberation, or otherwise, the act was done.

Exceptions and motion overruled.

STOREY *v.* EARLY.

Illinois, 1877. 86 Ill. 461.

This was an action instituted in the court below by Alice A. Early against Wilbur F. Storey, to recover damages for the publication of a libel in the newspaper known as The Chicago Times, of which the defendant was the proprietor.

Breese, J.[1] The sixth instruction for plaintiff was improperly given; it in substance says to the jury that, in fixing the amount of damages to be awarded as *compensation* to plaintiff for the injury she has sustained, "the wealth and standing of the defendant" might properly be considered.

It is not perceived how the injury actually done to plaintiff by the publication of this libel could be affected either by the wealth or standing of Wilbur F. Storey.

This is not a slander uttered personally by the defendant, nor is the libellous matter contained in any communication having the sanction of his name. The extent of the circulation of the newspaper of defendant, and the character and standing of that newspaper for fairness, justice, and truth, might well be considered upon that question. The wealth of the publisher might be great and his social standing high, and yet the paper might be of such character as to exert but little influence upon the public mind. On the other hand, the publisher might be insolvent, and his position in society very low, and yet the paper might be very attractive and have a very large circulation, and enjoy the confidence of the public to such a degree, for justice and truth, that statements in its columns might carry great weight.

There is a clear distinction between a publication of slanderous matter in a newspaper as a matter of news, and the

[1] Only part of the opinion is given.

publication of slanderous matter upon the personal truthfulness and responsibility of the defendant.

Again, the injury actually suffered in no sense is to be measured by the wealth of defendant. It must be observed that this instruction does not relate to *vindictive* or *punitive* damages, but solely to compensatory damages.

For the errors stated the judgment must be reversed and the cause remanded. *Judgment reversed.*

SCOTT, J. That part of the opinion by Mr. Justice BREESE which condemns an instruction given for plaintiff is not concurred in by any four members of the court, and hence the views expressed have no sanction from the court. The only cause for reversing the judgment, which has the sanction of a majority of the court, is that the court below erred in excluding from the jury certain letters received by defendant, which it is said contain the substance of the libellous publication.

DUVAL *v.* DAVEY.

Ohio Supreme Court Commission, 1877. 32 Oh. St. 604.

THIS was an action of slander for charging the female plaintiff with unchastity. Defendant offered evidence tending to show that the general reputation of the female plaintiff for chastity at the time when and at the place where the words were spoken, was bad; but upon objection by plaintiffs the court excluded the evidence. Defendant excepted.[1]

ASHBURN, J. Did the court err in refusing to allow defendant to prove, in mitigation of damages, plaintiff's general reputation for chastity?

This question is not without difficulty. The rule, as gathered from the text-books, is by no means uniform, and the reported decisions of other States and countries are in

[1] This short statement of facts is substituted for that of the Reporter Only so much of the opinion as relates to this exception is printed.

conflict on this point. Our own Supreme Court, in Dewitt *v.* Greenfield, 5 Ohio, 225, limits the inquiry to the "*general good or bad character of the party.*" The reason of the rule is said to be, "A man is supposed to be always ready to sustain his general character, but not to meet particular reports." This rule is too contracted to meet all cases. When a party is charged with a particular vice of character, that particular element of character is put in issue by the general denial; and the party, knowing that his character is assailed in a particular respect, must be held as ready to sustain his general character in the respect in which it is attacked, as to sustain it as a whole.

It is said in Dewitt *v.* Greenfield, "but spreading a plea of the truth of the words on the record, in justification, is always an aggravation of the damages, if not proven." This rule of damages has been changed by the case of Rayner *v.* Kinney, 14 Ohio St. 237. The rule that inquiry as to reputation must be confined exclusively to general good or bad character, is not sound. Indeed, it may be questioned whether the learned judge, who wrote the opinion in that case, contemplated that the rule, as announced, should cover all cases where character is in issue. If he did, the opinion contains evidence of, and authority for, a broader rule. He says, "under the general issue, the defendant, in mitigation of damages, may prove that the plaintiff, at the time of speaking the words, was under a general suspicion of having been guilty of the charge imputed to him." This we think the true rule, and renders the general doctrine of the case untenable.

Plaintiff's character for chastity was in issue under the general denial. It was the object of defendant's assault. Injury to it was the *gravamen* of complaint. The action was brought for its vindication. She claims, in her petition, that prior to the speaking of the slanderous words, by defendant, "she sustained a good name and character among her neighbors and acquaintances for chastity, moral worth, and integrity," and was never suspected of "unchaste conduct," etc.

Touching this point, 1 Greenleaf on Evidence, § 55, states

the modern rule to be, "But it seems that the character of the party, in regard to any particular trait, is not in issue, unless it be the trait which is involved in the matter charged against him." Taylor, in his work on Evidence, vol. i. § 334, p. 365, states the rule thus: "It seems, however, that here, as in other cases where witnesses to character are admitted, evidence must be confined to the particular trait which is attacked in the alleged libel; and, as to this, it can only furnish proof of general reputation, and must, by no means, condescend to particular acts of bad conduct." Foulkard's Starkie on Slander, etc., § 714; Foulkard's Law of Slander, etc. (4th ed.), 539; Bell *v.* Parke, 11 Irish Com. Law, 413–420; Earl of Leicester *v.* Walter, 2 Camp. 251; Turner *v.* Foxall, 2 Cranch C. C. 324; —— *v.* Moor, 1 M. & S. 285.

While we find a conflict of authority on this point, the modern cases are founded on better reason, and clearly admit the competency of general reputation in regard to the trait of character assailed. An examination of the cases we think would clearly show that the apparent conflict in the decisions arises principally from the nature of the pleadings or single nature of the accusation. But we will not pursue this branch of investigation, because we think, upon principle, a general reputation of want of good character in the very particular in which it has been assailed, is competent evidence in mitigation of damages.

The plaintiff seeks a compensation for a loss of character, not her reputation for truth, integrity, sobriety, or industry, but in respect to her reputation for chastity. That alone is claimed to have been soiled. That is put in issue. The law presumed it good, and therefore to her valuable. If her character for chastity has sustained no damage, she is entitled to but little or no compensation. If her general reputation for chastity was notoriously bad when the alleged slanderous words were spoken, could it be that the pecuniary injury sustained by her, from the wrongful act of defendant, is as great as it would have been if her general reputation for chastity had been untarnished?

That evidence of general reputation, as a woman, is admissible in mitigation of damages is not disputed. Such was the theory of the court below, but it went further, and ruled that evidence of the general reputation for chastity was not admissible. It seems to us the reason is much stronger for allowing evidence affecting her general character in respect to the trait that has been assailed. Reputation is complex, — made up of many things. A woman may possess many virtues, consequently a fair, or even good general reputation as a woman, and yet be notorious for some one vice. If the defamer assails all her virtues, she sustains an injury; if only her other vice is assailed, the injury is less.

Plaintiff asserts in her complaint that her standing in society, as a virtuous woman, has been assaulted and damaged, and that her character for chastity was, prior thereto, irreproachable. It is the element of chastity in her character which she claims has been damaged. Its value then becomes the proper subject of inquiry, — not her truthfulness, her integrity, her sobriety, her industry, — but her chastity alone. If that is worthless in the general market of public estimation, it would seem strange, indeed, if defendant might not show, in mitigation of damages, that it was generally reputed of little value.

The court erred in refusing to allow defendant to prove plaintiff's general reputation for chastity was bad.

Reversed and remanded.

MAHONEY *v.* BELFORD.

Massachusetts, 1882. 132 Mass. 393.

Devens, J. The defendant had charged the plaintiff with stealing from his employer, F. M. Weld. He had pleaded a justification, but at the trial did not seek to establish the truth of the words alleged to have been uttered. He did endeavor, in mitigation of damages, and to show that the

slander did not originate with himself, to offer testimony as to the general reputation as to the plaintiff's having, during the time he lived with Weld, and also at the time of the alleged slander, stolen from him. In such an action, evidence may be given of the general reputation of the plaintiff in those respects in which it has been assailed by alleged slander. Where one has been charged with theft, it may be shown that he was generally reputed a thief, in order thus to show that no serious injury can have been inflicted on him. Clark *v.* Brown, 116 Mass. 504. But what the defendant sought to prove was not the plaintiff's general reputation, which was the general character he had gained in the community by his course of life, but what was the common rumor as to a particular transaction, namely, his having stolen from Weld. The defendant sought to show, not that the plaintiff's general reputation was bad, but that in a single instance he was generally reputed to have behaved badly. This would have been to have proved the common talk as to an individual subject of scandal. A general report that the plaintiff is guilty of the particular crime with which he was charged cannot be received in evidence in mitigation of damages. Alderman *v.* French, 1 Pick. 1; Bodwell *v.* Swan, 3 Pick. 376; Clark *v.* Munsell, 6 Met. 373; Stone *v.* Varney, 7 Met. 86; Peterson *v.* Morgan, 116 Mass. 350.

Upon the question of damages the court instructed the jury "that they might consider the injury, if any shown, to the mental feelings of the plaintiff, which was the natural and necessary result of the words used, if in fact they were used as alleged, and were slanderous; that mental suffering was an element of damage." This was correct. The words, if uttered at all, were uttered, as appears by the bill of exceptions, in an angry dispute at an election, in the presence of from twenty to sixty persons. While the evidence was circumstantial, and not direct, that the plaintiff had been actually damnified and had endured mental suffering in consequence, "the occasion, circumstances, manner, and nature" of the alleged slander was such as warranted the plaintiff

in contending that they had occasioned actual injury and mental suffering, and in seeking substantial damages therefor. "Undoubtedly," says Chief Justice Bigelow in Markham *v.* Russell, 12 Allen, 573, "the material element of damage in an action for slander is the injury done to character. But it is not the sole element. A jury may have a right also to consider the mental suffering which may have been occasioned to a party by the publication of the slanderous words." See also Marble *v.* Chapin, 132 Mass. 225.

Exceptions overruled.

CHAPTER XI.

VALUE.

O'HANLAN *v.* GREAT WESTERN RAILWAY.

Queen's Bench, 1865. 6 B. & S. 484.

BLACKBURN, J. The case has been fully discussed, and we are of opinion that the rule should be discharged. The leave reserved was to enter the verdict for the defendants, if there was no evidence on which the jury could reasonably find more damages than £22, which had been brought into court. The goods originally cost at Leeds, cash down, £20, the price in the invoice being £20 10*s.* 9*d.* They were sent, by the defendants' railway, to Neath, where they ought to have arrived early in November, but they were lost. It was agreed in the course of the argument that the rule laid down in Rice *v.* Baxendale, 7 H. & N. 96, applies to the present case, viz., that setting aside all special damage the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner. Now the value of the goods at the place of delivery must be the market price, if there is a market there for such goods: if there is not, either from the smallness of the place or the scarceness of the particular goods, the value at the place and time of delivery would have to be ascertained as a fact by the jury, taking into consideration various matters, including, in addition to the cost price and expenses of transit, the reasonable profits of the importer, which are adjusted by what is called the higgling and bargaining of the market. Neath was a place where there was no market for such goods

as these, and the jury were therefore to take into consideration those elements. Where there is a market for goods of a particular description and they are actually sold, the price at which an importer sells them is regulated by his own average costs and charges, together with his average profit. For instance, the value of cotton at Liverpool, upon an average, exceeds the value of cotton in the Southern States of North America together with the freight, costs, and charges attendant upon its transport, otherwise no person would import it. The importer's profit, therefore, is an element in the market price of goods. Where there is no market from the nature of the thing no evidence of what the importer's profit is can well be given, and the jury must say what is the fair and reasonable profit which persons in the ordinary course of business would be likely to make. In the present case there was an intelligent jury, consisting of men of business in Glamorganshire, who would know what were the profits of persons who brought goods from a manufacturing district to a town in Wales. The defendants paid into court a sum calculated at something less than £10 per cent on the cost price to cover interest, expenses, and everything else. The question reserved is, were the jury warranted in giving the plaintiff more? The jury have found £25 damages. I think they were very liberal in doing so, but I cannot say they were wrong.[1]

GRAND TOWER CO. *v.* PHILLIPS.

United States Supreme Court, 1874. 23 Wall. 471.

Bradley, J.[2] In regard to the measure of damages, the plaintiffs were allowed to show the prices of coal during November and December, 1870, at all points on the Mississippi below Cairo even to New Orleans. And the court charged the jury against the exceptions of the defendant,

[1] Mellor and Shee, JJ., delivered concurring opinions.

[2] Part of the opinion is omitted.

that the true measure of damages was the cash value during those months of the kind of coal mentioned in the contract, at Cairo, or points below it on the Mississippi River, after deducting the contract price of the coal and the cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation. Now although it is probable that the plaintiffs could have got the prices which the evidence showed were obtained for coal at and below Cairo, had their coal been furnished according to the agreement, yet the rule of law does not allow so wide a range of inquiry, but regards the price at the place of delivery as the normal standard by which to estimate the damage for non-delivery. It is alleged by the plaintiffs that this rule would have been a futile one in their case, because no market for the purchase of coal existed at Grand Tower, except that of the defendant itself, which, by the very hypothesis of the action, refused to deliver coal to the plaintiffs, and which had the whole subject in its own control. This is certainly a very forcible answer to the proposition to make the price of coal at Grand Tower the only criterion. It is apparent that the plaintiffs would be obliged to resort to some other source of supply in order to obtain the coal which the defendant ought to have furnished them. And it would not be fair, under the circumstances of the case, to confine them to the prices at which the defendant chose to sell the coal to other persons. The true rule would seem to be, to allow the plaintiffs to show the price they would have had to pay for coal in the quantities which they were entitled to receive it under the contract, at the nearest available market where it could have been obtained. The difference between such price and the price stipulated for by their contract, with the addition of the increased expense of transportation and hauling (if any), would be the true measure of damages. To this is properly to be added the claim (if any) for keeping boats and barges ready at Grand Tower for the receipt of coal.

But the prices of coal at New Orleans, at Natchez, and

other places of distribution and sale, although they might afford a basis for estimating the profits which the plaintiffs might have made had the coal stipulated for been delivered to them, cannot be adopted as a guide to the actual damage sustained so long as any more direct method is within reach.

Judgment reversed.

BOOM COMPANY *v.* PATTERSON.

United States Supreme Court, 1878. 98 U. S. 403.

FIELD, J.[1] The defendant in error, Patterson, was the owner in fee of an entire island and parts of two other islands in the Mississippi River above the Falls of St. Anthony, in the county of Anoka, in Minnesota. These islands formed a line of shore, with occasional breaks, for nearly a mile parallel with the west bank of the river, and distant from it about one-eighth of a mile. The land owned by him amounted to a little over thirty-four acres, and embraced the entire line of shore of the three islands, with the exception of about three rods. The position of the islands specially fitted them, in connection with the west bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. All that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the islands with each other, and the lower end of the island farthest down the river with the west bank; and this connection could be readily made by boom sticks and piers.

The land on these islands owned by the defendant in error the company sought to condemn for its uses; and upon its application commissioners were appointed by the District Court to appraise its value. They awarded to the owner the sum of $3,000. The company and the owner both appealed from this award. . . .

[1] Part of the opinion is omitted.

In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

We do not understand that all persons except the plaintiff

in error were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. . . .

The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned. The contention on the part of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the company the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the company, lost this element of value in his property.

The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by counsel. Thus, In the Matter of Furman Street, 17 Wend. 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was, "What is the value of the property for the most advantageous uses to which it may be applied?" In Goodwin *v.* Cincinnati & Whitewater Canal Co., 18 Ohio St. 169, where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable.

And in Young *v.* Harrison, 17 Ga. 30, where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner. *Judgment affirmed.*

KOUNTZ *v.* KIRKPATRICK.

Pennsylvania, 1872. 72 Pa. 376.

AGNEW, J.[1] On the 7th of June, 1869, Kountz sold to Kirkpatrick & Lyon, two thousand barrels of crude petroleum, to be delivered at his option, at any time from the date, until the 31st of December, 1869, for cash on delivery, at thirteen and a half cents a gallon. On the 24th of June, 1869, Kirkpatrick & Lyon assigned this contract to Fisher & Brothers. Kountz failed to deliver the oil. He defends on the ground that Kirkpatrick & Lyon, and others holding like contracts for delivery of oil, entered into a combination to raise the price, by buying up large quantities of oil, and holding it till the expiration of the year 1869, and thus to compel the sellers of oil on option contracts, to pay a heavy difference for non-delivery. . . .

In the sale of chattels, the general rule is, that the measure is the difference between the contract price and the market value of the article at the time and place of delivery under the contract. It is unnecessary to cite authority for this well-established rule, but as this case raises a novel and extraordinary question between the true market value of the article, and a stimulated market price, created by artificial and fraudulent practices, it is necessary to fix the true meaning of the

[1] Part of the opinion is omitted.

rule itself, before we can approach the real question. Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because value and price are really convertible terms, but only because they are ordinarily so in a fair market. The primary meaning of value is worth, and this worth is made up of the useful or estimable qualities of the thing. See Webster's and Worcester's Dictionaries. Price, on the other hand, is the sum in money or other equivalent set upon an article by a seller, which he demands for it: Id. Ibid. Value and price are, therefore, not synonymes, or the necessary equivalents of each other, though commonly market value and market price are legal equivalents. When we examine the authorities, we find also that the most accurate writers use the phrase "market value," not "market price." Mr. Sedgwick, in his standard work on the measure of damages (4th ed.), p. 260, says: "Where contracts for the value of chattels are broken by the vendor's failing to deliver property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time it should be delivered upon the ground; that this is the plaintiff's real loss, and that with this sum, he can go into the market and supply himself with the same article from another vendor." Judge Rogers uses the same term in Smethurst *v.* Woolston, 5 W. & S. 109: "The value of the article at or about the time it is to be delivered, is the measure of damages in a suit by the vendee against the vendor for a breach of the contract." So said C.J. Tilghman, in Girard *v.* Taggart, 5 S. & R. 32. Judge Sergeant, also, in O'Conner *v.* Forster, 10 Watts, 422, and in Mott *v.* Danforth, 6 Id. 308. But as even accurate writers do not always use words in a precise sense, it would be unsatisfactory to rely on the common use of a word only, in making a nice distinction between terms. It is therefore

proper to inquire into the true legal idea of damages in order to determine the proper definition of the term "value." Except in those cases where oppression, fraud, malice or negligence enter into the question, "the declared object (says Mr. Sedgwick, in his work on Damages) is to give compensation to the party injured for the actual loss sustained," 4th ed., pp. 28, 29; also, pp. 36, 37. Among the many authorities he gives, he quotes the language of C. J. Shippen, in Bussy *v.* Donaldson, 4 Dallas, 206: "As to the assessment of damages (said he), it is a rational and legal principle, that the compensation should be equivalent to the injury." "The rule," said C.J. Gibson, "is to give actual compensation, by graduating the amount of the damages exactly to the extent of the loss." "The measure is the actual, not the speculative loss:" Forsyth *v.* Palmer, 2 Harris, 97. Thus, compensation being the true purpose of the law, it is obvious that the means employed, in other words, the evidence to ascertain compensation, must be such as truly reaches this end.

It is equally obvious, when we consider its true nature, that as evidence, the market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. It stands as a criterion of value, because it is a common test of the ability to purchase the thing. But to assert that the price asked in the market for an article is the true and only test of value, is to abandon the proper object of damages, viz., compensation, in all those cases where the market evidently does not afford the true measure of value. This thought is well expressed by Lewis, C.J., in Bank of Montgomery *v.* Reese, 2 Casey, 146. "The paramount rule in assessing damages (he says), is that every person unjustly deprived of his rights should at least be fully compensated for the injury he sustained. Where articles have a determinate value and an unlimited production, the general rule is to give their value at the time the owner was deprived of them, with interest to the time of verdict. This rule has been

adopted because of its convenience, and because it in general answers the object of the law, which is to compensate for the injury. In relation to such articles, the supply usually keeps pace with the demand, and the fluctuations in the value are so inconsiderable as to justify the courts in disregarding them for the sake of convenience and uniformity. In these cases, the reason why the value at the time of conversion, with interest, generally reaches the justice of the case, is that when the owner is deprived of the articles, he may purchase others at that price. But it is manifest that this would not remunerate him where the article could not be obtained elsewhere, or where from restrictions on its production, or other causes, its price is necessarily subject to considerable fluctuation." This shows that the market price is not an invariable standard, and that the converse of the case then before Judge Lewis is equally true — that is to say — when the market price is unnaturally inflated by unlawful and fraudulent practices, it cannot be the true means of ascertaining what is just compensation. It is as unjust to the seller to give the purchaser more than just compensation, as it is to the purchaser to give him less. Right upon this point, we have the language of this court in the case of a refusal by a purchaser to accept: Andrews *v.* Hoover, 8 Watts, 240. It is said: "The jury is bound by a measure of damages where there is one, but not always by a particular means for its ascertainment. Now the measure in a case like the present, is the difference between the price contracted to be paid and the value of the thing when it ought to have been accepted; and though a resale is a convenient and often satisfactory means, it does not follow that it is, nor was it said in Girard *v.* Taggart to be the only one. On the contrary, the propriety of the direction there, that the jury were not bound by it, if they could find another more in accordance with the justice of the case, seems to have been admitted; the very thing complained of here." Judge Strong took the same view in Trout *v.* Kennedy, 11 Wright, 393. That was the case of a trespasser, and the jury had been told that the plaintiff was entitled to

the just and full value of the property, and if at the time of the trespass the market was depressed, too much importance was not to be given to that fact. "If (says Judge Strong) at any particular time, there be no market demand for an article, it is not of course on that account of no value. What a thing will bring in the market at a given time, is perhaps the measure of its value then; but it is not the only one." These cases plainly teach that value and market price are not always convertible terms; and certainly there can be no difference in justice or law, in an unnatural depression and an unnatural exaltation in the market price, — neither is the true and only measure of value.

These general principles in the doctrine of damages and authorities, prove that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of estimating just compensation. It gives to the purchaser more than he ought to have, and compels the seller to pay more than he ought to give, and it is therefore not a just criterion. There is a case in our own State, bearing strongly on this point: Blydenburgh *et al. v.* Welsh *et al.*, Baldwin's Rep. 331. Judge Baldwin had charged the jury in these words: "If you are satisfied from the evidence, that there was on that day a *fixed* price in the market, you must be governed by it; if the evidence is doubtful as to the price, and witnesses vary in their statements, you must adopt that which you think best accords with the proof in the case." In granting a new trial, Judge Hopkinson said: "It is the price — the market price — of the article that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the *value,* the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate

it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, but according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance."

The case of suspended sales upon a rumor tending to enhance the price, put by Judge Hopkinson, bears no comparison to the case alleged here, where a combination is intentionally formed to buy up oil, hold it till the year is out, and thus force the market price up purposely to affect existing contracts, and compel the sellers to pay heavy damages for non-fulfilment of their bargains. In the same case, Judge Hopkinson further said: "We did not intend that they (the jury) should go out of the limits of the market price, nor to take as that price whatever the holders of the coffee might choose to ask for it; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought or sold." "In determining," says an eminent writer on contracts, "what is the market value of property at any particular time, the jury may sometimes take a wide range; for this is not always ascertainable by precise facts, but must sometimes rest on opinion; and it would seem that neither party ought to gain or lose by a mere fancy price, or an inflated and accidental value, suddenly put in force by some speculative movement, and as suddenly passing away. The question of damages by a market value is peculiarly one for a jury." Parsons on Contracts, vol. ii. p. 482, ed. 1857. In

Smith *v.* Griffith, 3 Hill, 337, 338, C.J. Nelson said: "I admit that a mere speculating price of the article, got up by the contrivance of a few interested dealers, is not the true test. The law, in regulating the measure of damages, contemplates a range of the entire market, and the average of prices, as thus found, running through a reasonable period of time. Neither a sudden and transient inflation, nor a depression of prices, should control the question. These are often accidental, promoted by interested and illegitimate combinations, for temporary, special, and selfish objects, independent of the objects of lawful commerce; a forced and violent perversion of the laws of trade, not within the contemplation of the regular dealer, and not deserving to be regarded as a proper basis upon which to determine the value, when the fact becomes material in the administration of justice." I may close these sayings of eminent jurists with the language of Chief Justice Gibson, upon stock-jobbing contracts (Wilson *v.* Davis, 5 W. & S. 523): "To have stipulated," says he, "for a right to recruit on separate account, would have given to the agreement an appearance of trick, like those of stock-jobbing contracts, to deliver a given number of shares at a certain day, in which the seller's performance has been forestalled by what is called cornering; in other words, buying up all the floating shares in the market. These contracts, like other stock-jobbing transactions, in which parties deal upon honor, are seldom subjected to the test of judicial experiment, but they would necessarily be declared fraudulent."

Without adding more, I think it is conclusively shown that what is called the market price, or the quotations of the articles for a given day, is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated. It remains only to ascertain whether the defendant gave such evidence as to require the court to submit to the jury to ascertain and determine the fair market value of crude oil per gallon, on the 31st of December, 1869, as demanded by the defendant in his

fifteenth point. There was evidence from which the jury might have adduced the following facts, viz.: That in the month of October, 1869, a number of persons of large capital, and among them Kirkpatrick & Lyon, combined together to purchase crude oil, and hold it until the close of the year 1869; that these persons were the holders, as purchasers, of a large number of sellers' option contracts, similar to the one in suit; that they bought oil largely, and determined to hold it from the market until the year 1870 before selling; that oil, in consequence of this combination, ran up in price, in the face of an increased supply, until the 31st day of December, 1869, reaching the price of seventeen to eighteen cents per gallon, and then suddenly dropped as soon as the year closed. Major Frew, one of the number, says: It was our purpose to take the oil, pay for it, and keep it until Jan. 1, 1870, otherwise we would have been heading the market on ourselves. Mr. Long says that on the 3d of January, 1870, he sold oil to Fisher & Brother (the plaintiffs) at thirteen cents a gallon, and could find no other purchaser at that price. Several witnesses, dealers in oil, testify that they knew of no natural cause to create such a rise in price, or to make the difference in price from December to January. It was testified, on the contrary, that the winter production of oil was greater in December, 1869, than in former years by several thousand barrels per day, a fact tending to reduce the price, when not sustained by other means. Mr. Benn says he knew no cause for the sudden fall in price on the 1st January, 1870, except that the so-called combination ceased to buy at the last of December, 1869.

It was, therefore, a fair question for the jury to determine whether the price which was demanded for oil on the last day of December, 1869, was not a fictitious, unnatural, inflated, and temporary price, the result of a combination to "bull the market," as it is termed, and to compel sellers to pay a false and swollen price in order to fulfil their contracts. If so, then such price was not a fair test of the value of the oil, and the jury would be at liberty to determine, from the

prices before and after the day, and from other sources of information, the actual market value of the oil on the 31st of December, 1869. Any other cause would be unjust and injurious to fair dealers, and would enable gamblers in the article to avail themselves of their own wrong, and to wrest from honest dealers the fruits of their business. It cannot be possible that a "corner" such as took place a few weeks since in the market for the stock of a Western railroad company, where shares, worth in the ordinary market about sixty dollars each, were by the secret operations of two or three large capitalists, forced up in a few days to a price over two hundred dollars a share, can be a lawful measure of damages. Men are not to be stripped of their estates by such cruel and wrongful practices; and courts of justice cannot so wholly ignore justice as to assume such a false standard of compensation.

Judgment reversed.

Sharswood and Williams, JJ., dissented.

FRANCE *v.* GAUDET.

Queen's Bench, 1871. L. R. 6 Q. B. 199.

Mellor, J. In this case the plaintiff, who is a wine merchant, had for a customer a Captain Hodder, whose ship was, on the 13th of August last, in the London Docks, and about to sail. A few days before, the plaintiff had obtained samples from a person named Restall, a wine broker, who ha l 100 cases of champagne for sale, then lying at the defendants' wharf, for which the price was 14*s.* per dozen. The plaintiff had handed the samples to Hodder, who, on the 13th of August, agreed to purchase the 100 cases from the plaintiff at 24*s.* per dozen, to be delivered next day, whereupon the plaintiff concluded the bargain with Restall, and obtained from him the freight note and the warrants for delivery of the wine, in order that he might obtain the same, so as to enable

him to perform his contract with Captain Hodder, who was then about to sail, and did actually sail on the 17th of August. On the 14th of August the plaintiff sent to the defendant's wharf and required the delivery of the wine, but the defendants refused to deliver the wine, on the ground that a stop had been previously put upon the delivery. The plaintiff being unable to obtain delivery of the wine, Captain Hodder sailed without it. It was admitted that champagne of that brand and quality was not to be obtained in the market, so as to enable the plaintiff to substitute 100 other cases of champagne for the 100 cases which he had purchased and contracted to sell to Captain Hodder. The wine had been delivered to the plaintiff after action brought, under a judge's order.

Upon this state of facts, the counsel for the defendants, at the trial before my brother Lush, contended that as the defendants had no notice of the contract between the plaintiff and Hodder, they were not liable in trover for more than the ordinary value of such wine at the time of the conversion; and that, inasmuch as the defendants had paid into court a sum which covered 4*s*. per dozen for reasonable profit, they were entitled to have the verdict entered for them.

My brother Lush reserved the question for the consideration of the Court, directing a verdict for the plaintiff for £30, being the difference between the sum paid into court and the profit at which the champagne had been contracted to be sold by the plaintiff to Hodder; with leave to move to enter a verdict for the defendants. He was not requested to leave any question to the jury; and it must be taken that if the plaintiff can recover any sum beyond that paid into court, the amount is to stand at £30, and it is also to be assumed that, if to entitle the plaintiff to recover that amount, notice of the contract between himself and Hodder ought to have been given to the defendants, then the sum paid into court was sufficient to satisfy the damages occasioned by the defendants' conversion of the wine.

Under ordinary circumstances the direction to the jury would simply be to ascertain the value of the goods at the

time of the conversion, and in case the plaintiff could, by going into the market, have purchased other goods of the like quality and description, the price at which that would have been done would be the true measure of damages.

It was, however, admitted on the trial, that in the present case that course could not have been pursued, inasmuch as champagne of the like quality and description could not have been purchased in the market, so as to enable the plaintiff to fulfil his contract with Captain Hodder.

We are of opinion that the true rule is to ascertain the actual value of the goods at the time of the conversion, and that a *bonâ fide* sale having been made to a solvent customer at 24*s.* per dozen, which would have been realized had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired an actual value of 24*s.* per dozen; and we think that, in the present case, that ought to be the measure applied, and that a jury would not only have been justified in assuming that to be the value, but ought, where the transaction was *bonâ fide*, to have taken that as the measure of damages, and under the reservation at the trial, we think that we ought to say that such is the proper measure of damages.

It was, however, objected at the trial, in analogy to the cases of special damage arising out of the breach of contract, that notice of the special circumstances ought to have been given to the defendants, in order to entitle the plaintiff to recover anything beyond the ordinary value of the goods converted; and Sedgwick on Damages was referred to and various passages were cited, the substance of which is to be found at page 559, 4th edition. The learned author says: "It appears to me that, in principle, unless the plaintiff has been deprived of some particular use of his property, of which the other party was apprised, and which he may be thus said to have directly prevented, the rights of the parties are fixed at the time of the illegal act, be it refusal to deliver or actual conversion, and that the damages should be estimated as at that time."

We are not prepared to say that there is any analogy between the case of contract alluded to, in which two parties making a contract for the sale and delivery of a specific chattel, the vendee gives notice to the vendor of the precise object of the purchase, and a case like the present. In the case of contract special damages, reasonably resulting from the breach of it, may be considered within the contemplation of the parties. In case of trover, it is not in general special damage which can be recovered, but a special value attached by special circumstances to the article converted; the conversion consists in withholding from another property to the possession of which he is *immediately* entitled, and the circumstances which affix the value are then determined; no notice to the wrong-doer could then *affect the value*, although it might affect his conduct; but upon what principle is a notice necessary to a man who *ex hypothesi* is a wrong-doer? In such a case as the present, the actual value is fixed by circumstances at the time of the demand, and no notice of the special circumstances could then affect the actual value of the goods withheld from their rightful owner, who thereby sustains "an actual present loss," which appears to us to be a convertible term with "actual value."

It is not necessary to determine whether notice is or is not necessary in trover, in order to enable a plaintiff to recover special damage which cannot form part of the actual present value of the things converted, as in case of the withholding of the tools of a man's trade, in which the damage arising from the deprivation of his property is not, and apparently cannot be fixed at the time of the conversion of the tools. In that case, however, we are inclined to think that either express notice must be given, or arise out of the circumstances of the case. This point was not determined in Bodley *v.* Reynolds, 8 Q. B. 779, approved in Wood *v.* Bell, 5 E. & B. 772; 25 L. J. (Q. B.) 148. But we think that there must have been evidence of knowledge on the part of the defendant that in the nature of things inconvenience beyond the loss of the tools must have been occasioned to the plaintiff.

The rule will be discharged. *Rule discharged.*

STICKNEY *v.* ALLEN.

Massachusetts, 1858. 10 Gray, 352.

Action of tort for converting to the defendant's use stereotype plates, the property of the plaintiffs.[1]

Metcalf, J. The proper rule of damages was prescribed by the judge, namely, the fair value of the plates to the plaintiffs. And he allowed the jury to take into consideration, in estimating that value, the cost of replacing the plates. The defendant insists that the market value was the true rule of damages. And this is doubtless the general rule in trover. But this rule presupposes the conversion of marketable property. Whereas, in this case, it was admitted by the defendant's counsel, in argument, that the plates in question were made for the printing of labels or advertisements in the plaintiffs' names, which were to be used by them only, in their special business; and the exceptions show that it was in evidence that they were of very trifling value, except to the plaintiffs. Such things cannot with any propriety be said to have a market value. And the actual value to him who owns and uses them is the just rule of damages in an action against him who converts them to his own use. Suydam *v.* Jenkins, 3 Sandf. 621, 622.

There is no ground for the defendant's objection, that damage to the amount of the value of the plates to the plaintiffs alone was special damage, and therefore not recoverable, because not alleged in their declaration. Special damage, in trover, is that which the plaintiff sustains beyond the mere loss of his property by its conversion. Davis *v.* Oswell, 7 Car. & P. 804; Bodley *v.* Reynolds, 8 Ad. & El. N. R. 779. If the plaintiffs, in this case, had offered evidence that by the loss of their plates their business was obstructed, it would not have been admissible, under their declaration, for the purpose of proving damage beyond the value of the plates. Mayne on Damages, 212.

[1] The statement of facts and part of the opinion are omitted.

HARRIS *v.* PANAMA RAILROAD.

New York, 1874. 58 N. Y. 660.

This action was brought to recover damages for the killing of a race-horse while being transported upon defendant's road, across the Isthmus of Panama, through the alleged negligence of defendant.

Upon the trial evidence was given tending to show that, while the horse could have been sold for some price, there was no market price, properly speaking, for such a horse on the Isthmus. Plaintiff offered, and was allowed, to prove that the route over the Isthmus was part of a usual route to California, which was the destination of the horse in question, and also to prove the market value at San Francisco. The court instructed the jury, that they were to use the proof submitted to enable them to answer the question of the value at the time and place of the injury. *Held*, no error; that where there is a market price or value at the time and place that is the most suitable means of ascertaining value, but not the only one (Muller *v.* Eno, 14 N. Y. 597, 607, 608; Parks *v.* Morris Axe and Tool Co., 54 Id. 593); but that this species of evidence could only be completely reliable where it appears that similar articles have been bought and sold, in the way of trade, in sufficient quantity or often enough to show a market value; and in the absence of such proof, proof of such value at some other place was admissible; in which case the place of destination was the most natural resort to supply the needed proof; it being resorted to, however, only to enable the jury to answer the inquiry as to the value at the place of the actual loss, great deduction being made for the risk and expense of further transportations.[1]

Judgment affirmed.

Part of the case is omitted.

FAIRFAX *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD.

New York, 1878. 73 N. Y. 167.

This action was brought to recover the value of a portmanteau and contents, alleged to have been delivered to defendant at Troy to be transported to New York, and to have been lost through its negligence.[1]

Earl, J. The court did not err in charging the jury that the plaintiff was entitled to recover the full value of the clothing for use to him, in New York, and not merely what it could be sold for in money. The clothing was made to fit plaintiff, and had been partly worn. It would sell for but little, if put into market to be sold for second-hand clothing, and it would be a wholly inadequate and unjust rule of compensation to give plaintiff, in such a case, the value of the clothing thus ascertained. The rule must be the value of the clothing for use by the plaintiff. No other rule would give him a compensation for his damages. This rule must be adopted, because such clothing cannot be said to have a market price, and it would not sell for what it was really worth.

Judgment affirmed.

GREEN *v.* BOSTON & LOWELL RAILROAD.

Massachusetts, 1880. 128 Mass. 221.

Contract against a common carrier to recover the value of an oil painting, the portrait of the plaintiff's father.[2]

Morton, J. The defendant asked the court to rule that "the plaintiff can recover only a fair market value of the article lost." The general rule of damages in trover, and

[1] Part of the case is omitted.

[2] The statement of facts and part of the opinion are omitted.

in contract for not delivering goods, undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property. To instruct a jury that the measure of damages for the conversion or loss of a family portrait is its market value would be merely delusive. It cannot with any propriety be said to have any market value. The just rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner. Stickney *v.* Allen, 10 Gray, 352. The court properly refused to give the instruction requested, and we are to presume gave proper instructions instead thereof. This being the rule of damages, the testimony of the plaintiff that he had no other portrait of his father would bear upon the question of its actual value to him, and was competent.

GLASPY *v.* CABOT.

Massachusetts, 1883 135 Mass. 435.

Field, J.[1] These defendants converted the schooner as she lay on Coffin's Beach in Annisquam Harbor. If there was no market for such a vessel at Annisquam, it was her value as she lay there that the defendants are liable to pay. But in determining her value there by her value elsewhere, a reasonable allowance must be made "for the probable cost of getting her off, repairing her, and getting her" to market, "less also a reasonable allowance for diminution in her market value on account of having been ashore." These allowances were made. The risks and chances of getting her afloat and getting her to market must also be taken into account. If there was no market at Annisquam, the learned justice had a right to consider, in assessing damages, the market value in St. John, if that was the principal market, or one of the prin-

[1] Part of the opinion is omitted.

cipal markets, in which such vessels are bought and sold, and it was practicable to attempt to carry her there. He had a right also to consider other markets; the test is what buyers of vessels, from St. John, Boston, or other ports, would pay for her as she lay on Coffin's Beach, if all the facts of her condition were known. If there were no direct satisfactory evidence of this, and the court was satisfied that St. John was the best market, and that it was practicable to attempt to take her there, her market value when taken to St. John could be considered; but, in addition to the allowances made from her market value in St. John, there should have been an allowance for the fair value of the risks of getting her there. If she were properly repaired for the voyage, the usual rate of insurance for such a vessel on such a voyage would be evidence of the value of the risk of taking her from the port of repair to St. John. Perhaps a fair salvage for getting her off and bringing her to a port of repair, when the salvors would be entitled to nothing except out of the property saved, would be evidence of the amount of the allowance to be made for the risk and cost of removing her to such a port. We think the rule of damages adopted was too liberal under the circumstances stated in the exceptions, and that there must be a new trial in the second action, upon the amount of damages only. Bourne *v.* Ashley, 1 Lowell, 27; Saunders *v.* Clark, 106 Mass. 331; Coolidge *v.* Choate, 11 Met. 79. *Ordered accordingly.*

DU BOST *v.* BERESFORD.

Westminster Sittings, 1810. 2 Camp. 511.

Trespass for cutting and destroying a picture of great value, which the plaintiff had publicly exhibited; *per quod* he had not only lost the picture, but the profits he would have derived from the exhibition. Plea, *not guilty.*

It appeared that the plaintiff is an artist of considerable eminence, but that the picture in question, entitled *La Belle*

et la Bête, or "Beauty and the Beast," was a scandalous libel upon a gentleman of fashion and his lady, who was the sister of the defendant. It was exhibited in a house in Pall-Mall for money, and great crowds went daily to see it, till the defendant one morning cut it in pieces. Some of the witnesses estimated it at several hundred pounds.

The plaintiff's counsel insisted, on the one hand, that he was entitled to the full value of the picture, together with a compensation for the loss of the exhibition; while it was contended, on the other, that the exhibition was a public nuisance, which every one had a right to abate by destroying the picture.

Lord Ellenborough. The only plea upon the record being the general issue of *not guilty*, it is unnecessary to consider, whether the destruction of this picture might or might not have been justified. The material question is, as to the value to be set upon the article destroyed. If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages, must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts.

Verdict for the plaintiff. Damages £5.[1]

REDMOND *v.* AMERICAN MANUFACTURING CO.

New York, 1890. 121 N. Y. 415.

O'Brien, J. The plaintiff was the inventor of a machine, upon which he procured a patent, for the purpose of inserting and fastening rivets in the joints of umbrella ribs and stretchers where they are fastened together. The defendant,

[1] Part of the case is omitted.

a corporation organized for manufacturing purposes, was engaged in making and selling the ribs and other parts of umbrellas. The plaintiff and defendant entered into an agreement to the effect that the plaintiff should manufacture and set up in the defendant's factory fourteen of these machines, and should for a certain period, personally or by skilled agents, superintend the operation of the same and instruct defendant's employes in the operation thereof. The defendant during this period was to furnish sufficient work for the operation of the machines to their full capacity, and to pay the plaintiff's agents for their services in superintending the operation of the machines and instructing its employes in their use out of the saving that might be effected by the machines in the cost of doing the work which previously had been done by hand at a certain specified price per dozen sets. At the expiration of this period the defendant was to have the option of returning the machines to the plaintiff or of purchasing the same and paying therefor a certain agreed price, which should be equal to the sum found to be the saving on 300,000 dozen sets by said machines working to their full capacity, compared with the cost of doing the same work by hand at the prices paid therefor and specified in the agreement. The plaintiff manufactured and put the machines in the defendant's factory, and furnished persons to superintend the operation thereof, but he claims that the defendant failed to furnish sufficient work during the period of trial to enable said machines to be operated to their full capacity, and that, notwithstanding this failure, the machines did actually effect a saving of fully one half in the previous cost of the work. At the conclusion of the trial period the defendant did not elect to purchase the machines. The title to the same never passed from the plaintiff, and on Oct. 27, 1884, he demanded of the defendant the return to him of the property. This demand gave rise to negotiations between the parties, which, however, ended without any result, whereupon the plaintiff brought this action to recover the possession of the fourteen machines, or their value in case a

delivery to him could not be made, and the sum of $15,000 as damages for the detention thereof after demand.

On the trial of the action in the Superior Court, the plaintiff recovered, the jury assessing the value of the property at $2,100, and under the charge of the court the plaintiff was awarded $445, being the interest on the value of the machines from the time of the demand, as damages for the unlawful detention.

The plaintiff, at the trial, offered to prove the value of the use of the machines from the time of the demand as his damages for their detention, but the evidence was excluded under the defendant's objection, the plaintiff excepting. The plaintiff appealed from so much of the judgment in his favor as limited the damages for detention to the interest on the value of the property, and the General Term has affirmed the ruling at the trial on this question of damages.

The property in question was evidently manufactured and delivered to the defendant for the purpose of sale. The precise sum to be paid was not specified in dollars and cents, but depended upon what the machines could accomplish in the way of saving for the defendant within a designated period of time under certain conditions, and in this way the price of the article was capable of being ascertained by a process of calculation provided for in the agreement under which it was delivered by the plaintiff. The record does not show that the machines had any marketable value, and it is to be inferred from the proofs at the trial that they had been recently invented, and had not been yet brought into such general use as to furnish any reliable or certain standard of value for their use by the defendant. The agreement under which they came into the defendant's possession shows that their general utility and capacity had not been fully established, and that they were considered by both parties as somewhat of an experiment. The property being without a market value the parties at the trial were obliged to submit the case to the jury upon evidence given by both sides as to their intrinsic value or the cost of production. There is no com-

plaint on the part of the plaintiff that the property was less valuable at the trial on account of the manner in which it was used, or for any other reason than when it was delivered to the defendant. The wrong that the plaintiff has suffered consisted entirely in the neglect of the defendant to return the property to the plaintiff when he demanded it. The property was rightfully in defendant's possession until the parties, at the end of the trial period, failed to agree upon a price for it upon the basis of the agreement. The plaintiff was entitled to have the value of the property, at the time of the trial, found and awarded to him in case the property itself could not be returned (N. Y. G. & I. Co. *v.* Flynn, 55 N. Y. 563), and the jury assessed the value as of that time. If the interest on this value during the time that the defendant retained the property after demand is, under the circumstances of this case, the legal compensation for the defendant's wrong in not returning the property on demand, the plaintiff has no reason for complaint. It is urged upon this appeal on the authority of Allen *v.* Fox, 51 N. Y. 562, that he was entitled to recover as damages for the unlawful detention of the property such sum as he could prove to be the value of the use of the property during the period that it was wrongfully detained. That was an action to recover the possession of a horse, and what is there called the usable value of the horse, was held to be a proper measure of damages for its detention. The learned judge, who gave the opinion in the case, admits that the interest on the value of the property, at the time of the trial, is generally the proper measure of damages for its wrongful detention when it consists of merchandise kept for sale, and all other articles of property, valuable only for sale or consumption. In actions to recover the possession of specific personal property, many cases, no doubt, may and do arise where the interest would not furnish to the owner of the property a just or sufficient indemnity for his loss; but such cases are special and exceptional, and it is scarcely possible to group them under any general rule or principle. There is a manifest difference

between the case of the wrongful detention of a horse or other property which is in constant and daily use, and the usable value of which is well known and readily ascertained, and property of the character of that which was the subject of controversy in this case. Here the property was manufactured and delivered to the defendant for the purpose of sale, like any other article of merchandise. It is not claimed, and it is not at all likely that the plaintiff could have put the machines to any other use while the defendant detained them after the demand. When machinery, in operation, is taken from the owner of a factory, who requires it for immediate, constant, and daily use, and detained by the wrong-doer, such an act would probably inflict upon the owner damages which could not be compensated by the interest on its value for the period of the wrongful detention. But, when, as in this case, the maker of a patented machine or article, desiring to introduce it into general use, delivers it with a view to a sale and afterward becomes entitled to have the same returned to him by reason of the failure of the party to whom it is delivered on trial to accept it, or comply with the terms and conditions upon which it was delivered, the interest on its price or value from the time of the wrongful detention to the trial furnishes a just indemnity for the wrong and the proper rule of damages in such cases.

We think that the record in this case does not disclose any of those special features calling for a larger measure of damages than that generally applicable to cases for the conversion of personal property, namely, the interest on its fair value from the time of the conversion. Brizsee *v.* Maybee, 21 Wend. 144; Rowley *v.* Gibbs, 14 Johns. 385.

The judgment is right and should be affirmed.

All concur. *Judgment affirmed.*

CHAPTER XII.

INTEREST.

DODGE *v.* PERKINS.

Massachusetts, 1830. 9 Pick. 368.

PUTNAM, J.[1] The questions arising in this case are, *first*, whether the defendant is liable to pay interest from the time when he received the money, to the time when the plaintiff, as the executor of Unite Dodge, deceased, demanded payment.

And if so, then, *secondly*, upon what amount the interest shall be calculated.

The action is upon an implied assumpsit, and the judgment sounds wholly in damages for the non-performance of the contract or undertaking. If the interest is not included in the contract, it cannot be given. If it is included, then it should make up a part of the judgment.

This rule applies as well to implied as to express contracts, and to verbal as well as to written promises. Where there is an express promise in writing to pay interest, the amount of the damages becomes a mere matter of calculation. But whether there has been an implied promise to pay interest, often depends upon the usages of trade and dealings between the parties, and other circumstances, which explain the duty undertaken to be performed. And if upon the whole matter the defendant has not performed it, interest is to be assessed as damages for the breach. If it were not so, the

[1] Part of the opinion is omitted.

remedy would be incomplete. Those usages of trade, and other facts and circumstances, and the dealings between the parties, are proper subjects for the consideration of the jury. But when they are agreed by the parties or found by the jury, the law arising from them is to be declared by the court.

If, for example, one should promise in writing to pay money to another on a day certain, and fail to do so, interest would be added to the amount of damages, notwithstanding the writing did not express it. It would be added as a compensation for the non-performance of the contract. If there were a verbal contract to the same effect, the same rule of damages should be followed. The case of Robinson *v.* Bland, 2 Burr. 1086, is a leading one upon this point. It was before the Revolutionary War, and was determined by Lord Mansfield and his able associates, upon sound principles. It was for money lent in France, for the security of which a bill of exchange was drawn payable at a short sight in England. The bill of exchange however was avoided, because it was given for money lent at the time and place of gaming. The *contract* raised by the law, to pay for the money lent, was held to be good, although the *security* was void. Upon the facts found, the court were to determine whether interest should be payable; and they held that it was to be *inferred*, from the facts proved, that the money was to be paid in England at a certain time, and that interest should be added, as part of the damages, up to the time of the judgment.

There the borrower, Sir John Bland, died, and there was no express promise concerning interest. The money was not paid. Lord Mansfield said, "Although this be nominally an action for damages, and damages be nominally recovered in it, yet it is really and effectually brought for a specific performance of the contract. For where money is made payable by an agreement between parties, *and a time given for the payment of it, this is* a contract to pay the money at the given time, and to pay interest for it from the given day, in case of failure of payment at that day." Wilmot, J., in a very able

opinion, said (p. 1083), the damage was the whole interest due upon the money lent, from the time of its being payable, up to the time of signing the judgment. Interest was added to the principal sum accordingly, and the judgment was for the aggregate sum, as damages for the breach of the contract.

If the money is not paid at the day stipulated, the debtor is in fault. He detains the money of his creditor. So if the money is payable upon demand, interest is allowable after a demand, by writ or otherwise. The law supposes the party to be in fault, if he does not pay upon demand.

The great inquiry is, whether the party has done all that the law required of him in the particular case; whether acting on his own account, or as agent, executor, administrator, guardian, or trustee for others. If he has, he is not accountable for interest; if he has not, he is accountable for it as a compensation for the non-performance of his contract.

There are cases where the law requires the party to pay over money which he has acquired, immediately, without waiting for any demand or request of payment; as where he has obtained it by fraud. The promise which the law implies, extends as well to the interest as to the principal sum, so wrongfully acquired and detained. In Wood *v.* Robbins, 11 Mass. R. 506, the party was originally and continually in fault.

The same rule applies where the party received the money lawfully, for a particular purpose, and misapplied it; as in Fowler *v.* Shearer, 7 Mass. R. 14, where the defendant (who was an attorney) should have indorsed it on a note which he held for collection, but did not, and in consequence of his neglect the promiser was obliged to pay the whole of the note. It was held that the attorney was accountable for interest, as well as principal, and Parsons, C.J., thought that the interest should commence from the time of payment. That was an action for money had and received.

The same rule is recognized in Hughes *v.* Kearney, 1 Sch. & Lefr. 134, where the vendee retained part of the purchase money to pay off encumbrances, but did not. It was deter-

mined that it should carry interest, because there was a misappropriation.

The same rule should apply where a party has acted as agent to render a reasonable account, but has omitted to do so for an unreasonable time. Interest should be calculated from the time of the breach of his undertaking. Crawford *v.* Willing, 1 Dallas, 349, note.

If the party were a stakeholder without fault, he would not be chargeable, notwithstanding the money were in his hands several years. Lee *v.* Munn, 8 Taunt. 45.

S. P. in Williams *v.* Storrs, 6 Johns. Ch. R. 353. But "if the agent had received the money," said the Chancellor, "and neglected for a long time to inform his principal of the fact, and wilfully suffered him to remain in ignorance that his debtor had paid to the agent, there would be equity in requiring the agent to pay interest, for here would be a case of default, and breach of duty."

A factor is in duty bound to account to his principal, in a reasonable time, without any demand, in cases where a demand would be impracticable or highly inconvenient. He would be held, according to the course of business, to give his principal information of his progress in the transaction, and if he should neglect unreasonably to forward his account to his employer, this negligence would be a breach of his contract and subject him to an action. Clark *v.* Moody, 17 Mass. R. 149; Lady Ormond *v.* Hutchinson, 13 Ves. 53; Earl of Hardwicke *v.* Vernon, 14 Ves. 504.

It is the settled law of New York, that interest is to be allowed for money received or advanced for the use of another, "*after a default in payment.*" Campbell *v.* Mesier, 6 Johns. Ch. R. 24.

So if the agent had engaged to invest the money, but omitted to do so, he is to answer for the interest from the time he should have invested. Brown *v.* Southouse, 3 Bro. C. C. 107; The People *v.* Gasherie, 9 Johns. R. 71.

There are some late English cases, which would seem to be contrary to the rule requiring interest after non-payment at a day certain.

Thus in Gordon *v.* Swan, 12 East, 419, which was for the price of goods sold and delivered payable on a certain day, Lord Ellenborough said, that "the giving of interest should be confined to bills of exchange and such-like instruments." No reasons are given, and it is not easy to see why the same rule of damages should not be applied in that case, as in the case of any other contract for money to be paid at a certain day.

In Higgins *v.* Sargent, 2 B. & C. 348, the restriction of interest to mercantile securities was recognized, and Abbott, C.J., stated the rule to be established, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances.

Now I have no objection to this general rule, but I very much doubt the application of it according to the case of Higgins *v.* Sargent. That was on a policy upon the life of one Burton, payable in six months after proof of his death. It is difficult to perceive a good reason why interest should not have been given after the money ought to have been paid according to the promise. *That*, we have seen, was the principle adopted by Lord Mansfield and his associates, where the promise was raised by *implication of law*. *A fortiori* would it seem to apply to an undertaking in *writing*. Lord Thurlow, in Boddam *v.* Ryley, 1 Bro. C. C. 239, and 2 Bro. C. C. 2, after noticing many cases, comes to the conclusion, that "all contracts to pay undoubtedly give a right to interest from the time when the principal ought to be paid."

We have no statute regulating this subject, and none is necessary. Upon the principles of the common law, we think it clear that interest is to be allowed, where the law by implication makes it the duty of the party to pay over the money to the owner without any previous demand on his part. Thus, where it was obtained and held by fraud, interest should be calculated from the time when it was received. So, where there has been a default of payment according to agreement,

express or implied, to pay on a day certain, or after demand, or after a reasonable time.

The nature and extent of the undertaking must depend upon the facts proved in each particular case. But when it is ascertained at what time the money should have been paid, the law raises a promise to pay damages for the detention after the breach of the contract. For it is the essence of every assumpsit or undertaking, that it is to be performed specifically, or that damages shall be paid for the non-performance.

VAN RENSSELAER *v.* JEWETT.

New York, 1849. 2 Comst. 135.

APPEAL from the Supreme Court, where the action was brought by the executors of the will of Stephen Van Rensselaer, deceased, against Jewett, upon a covenant to pay rent. On the trial at the Albany circuit in October, 1844, before PARKER, Circuit Judge, the case was this: By an indenture dated Dec. 8, 1813, the said Stephen Van Rensselaer conveyed unto one William Davis, his heirs and assigns, one hundred and eighty-eight acres of land, situated in Guilderland, in the county of Albany, reserving the yearly rent of *eighteen bushels of wheat, four fat hens, and one day's service with carriage and horses*, which by the same indenture the said William Davis covenanted to pay. This indenture having been read in evidence, the plaintiffs proved an assignment to the defendant made in 1834, of eighty-four acres of the same premises. The plaintiffs then further proved that the amount of rent due for the portion of the premises so assigned to the defendant for the years 1835, 1836, 1837, and 1838, including interest, was at the time of the trial $82.18. In this calculation the defendant was charged in the proportion that the number of acres assigned to him bore to the whole number included in the conveyance, and *with interest upon each item of rent from the time, or about the time, when it fell due.*

It appeared that the value of the wheat, &c., fluctuated in the different years above mentioned. The defendant objected to the proof and allowance of interest, but the Circuit Judge overruled the objection, and the defendant excepted. The defendant's counsel also moved for a nonsuit on the grounds: 1. That the reservation of the rents was void; 2. That there was no evidence of the relative value of the lands assigned to the defendant and the remainder of the premises. The motion was denied, and the defendant excepted. The jury, by the direction of the court, gave their verdict in the plaintiff's favor for $82.18 damages. The Supreme Court refused a motion for a new trial made on bill of exceptions, and the defendant appealed to this court.

BRONSON, J. It is unnecessary to inquire what should have been the rule in apportioning the rent; for as the proof stood when the motion for a nonsuit was made, the plaintiff was clearly entitled to recover something, and the motion was therefore properly overruled. The question was not raised in any other form than by the motion for a nonsuit.

The only question is on the allowance of interest. The payment was not to be made in money, nor was a specified sum to be paid in any other way. The damages were unliquidated; and there was no agreement for interest. As the authorities bearing on the question have been very fully considered by the Supreme Court in this, and another case which will be mentioned, it cannot be necessary to review them on the present occasion. It was decided in 1806, without assigning any reason for the judgment, that interest was not recoverable in a case of this kind. Van Rensselaer *v.* Platner, 1 John. 276. But since that time the Supreme Court has deliberately held, on three several occasions, including the present one, that interest is recoverable in such a case. Lush *v.* Druse, 4 Wend. 313; Van Rensselaer *v.* Jones, 2 Barb. 643. The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that

he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought, in all such cases, to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained; and when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest after the default, as he would be if the like sum had been payable in money. The English courts do not allow interest in such cases; and I feel some difficulty in saying that it can be allowed here, without the aid of an act of the legislature to authorize it. But the courts in this and other States have for many years been tending to the conclusion which we have finally reached, that a man who breaks his contract to pay a debt, whether the payment was to be made in money, or in anything else, shall indemnify the creditor, so far as that can be done by adding interest to the amount of damage which was sustained on the day of the breach. The rule is just in itself; and as it is now nearly nineteen years since the point was decided in favor of the creditor, and eight out of nine judges of the Supreme Court have, at different times, concurred in that opinion, we think the question should be regarded as settled.

New trial denied.

DANA v. FIEDLER.

New York, 1854. 12 N. Y. 40.

Action to recover damages for the non-delivery of one hundred and fifty casks of madder, sold by Fiedler to Dana.[1]

Johnson, J. Interest is a necessary item in the estimate of damages in this class of cases. The party is entitled on the day of performance to the property agreed to be delivered; if it is not delivered, the law gives, as the measure of compensation then due, the difference between the contract and market prices. If he is not also entitled to interest from that time as matter of law, this contradictory result follows, that while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount, that the longer a party is delayed in obtaining it, the greater shall its inadequacy become. It is however conceded to be law, that in these cases the jury may give interest by way of damages, in their discretion. Now, in all cases, unless this be an exception, the measure of damages in an action upon a contract relating to money or property is a question of law, and does not at all rest in the discretion of the jury. If the giving or refusing interest rests in discretion, the law, to be consistent, should furnish some legitimate means of influencing its exercise by evidence, as by showing that the party in fault has failed to perform, either wilfully or by mere accident, and without any moral misconduct. All such considerations are constantly excluded from a jury, and they are properly told that in such an action their duty is to inquire whether a breach of the contract has happened, not what motives induced the breach.

That by law a party is to have the difference between the contract price and the market price, in order that he may be

[1] This short statement of the cause of action is substituted for the statement of facts of the reporter. Part of the opinion is omitted.

indemnified, and because that rule affords the measure of his injury when it occurred; that he may not as matter of law recover interest, which is necessary to a complete indemnity; that nevertheless the jury may, in their discretion, give him a complete indemnity, by including the amount of interest in their estimate of his damages; but that he may not give any evidence to influence their discretion, presents a series of propositions, some of which cannot be law. The case of Van Rensselaer *v.* Jewett, 2 Comst. 141, establishes a principle broad enough to include this case, and has freed the law from this as well as other apparent inconsistencies in which it was supposed to have become involved. The right to interest, in actions upon contract, depends not upon discretion but upon legal right, and in actions like the present is as much a part of the indemnity to which the party is entitled as the difference between the market value and the contract price. If, therefore, the general term committed any error, it is not one of which the defendant can complain, as it was in his favor, and deprived the plaintiffs of part of the relief to which they were by law entitled.

The judgment should be affirmed.

SELDEN, J., dissented.

McMAHON *v.* NEW YORK & ERIE RAILROAD.

New York, 1859. 20 N. Y. 463.

APPEAL from the Supreme Court. Action to recover for work performed and materials furnished by Patrick McMahon (who had assigned his claim to the plaintiff) in the construction of two sections of the New York & Erie Railroad. The trial was before one of the justices, without jury and sitting in part out of term time, under a stipulation, substantially as referee. It appeared that the work was performed under a written contract, and was completed in October, 1848. A large part of it consisted of earth and rock excavation, of which three

different classes were defined in the contract, a different price being stipulated for the execution of each class. The contractor had received monthly payments, according to the estimates, classifications, and measurements made by the engineers of the defendant; and if these were correct, there was a very trifling sum due to him when the work was completed. The referee reported that there was due to the plaintiff the sum of $9,927.85, for which judgment was rendered. Upon appeal, the court at general term, in the third district, affirmed the judgment conditionally, upon the plaintiff stipulating to deduct $914.49, which he did, and the defendant appealed to this court. The material facts are sufficiently stated in the following opinion.

SELDEN, J.[1] Each of the contracts, of which there were two, contained the following provision, viz.: "The work shall be executed under the direction and constant supervision of the engineer of the company, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined, and who shall have full power to reject or condemn all work or materials which in his opinion do not fully conform to the spirit of this agreement; and shall decide every question which can or may arise between the parties, relative to the execution thereof, and his decision shall be final and binding upon both parties." . . .

An exception was taken to the allowance of interest by the referee, and this is now insisted upon as fatal to the judgment. The old common-law rule, which required that a demand should be liquidated, or its amount in some way ascertained before interest could be allowed, has been modified by general consent, so far as to hold that if the amount is capable of being ascertained by mere computation, then it shall carry interest; and this court in the case of Van Rensselaer *v.* Jewett, 2 Comst. 135, went a step further, and allowed interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-

[1] Part of the opinion is omitted.

established market values; because such values in many cases are so nearly certain, that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay. That case went, I think, as far as it is reasonable and proper to go in that direction. So long as the courts adhere even to the principles of that case, they are not without a rule which it is possible to apply. The rule itself is definite, and the only uncertainty which it introduces is that which necessarily attends the settling of market rates and prices. In the present case the plaintiff's demand was neither liquidated nor capable of being ascertained by computation merely; nor could its amount be determined by any reference to ordinary market rates, and hence interest could not be recovered here upon the principle adopted in the case of Van Rensselaer *v.* Jewett.

There is, however, another ground upon which interest sometimes is allowed, and perhaps with propriety may be, although the amount of the demand neither has been nor can readily be ascertained, viz.: that the debtor is in default for not having taken the requisite steps to ascertain the amount of his debt. The present case is one which strongly illustrates the reasonableness of such a rule. Whether the engineer, by whom the work was to be measured, is to be legally regarded in respect to that duty, as the agent of both parties, or of the defendants only, he was in the general employment of the defendants, and ready to obey their behests. If they had done their duty, by causing him to make an accurate estimate of the work, the amount of the claim would have been so ascertained as to have carried interest. Perhaps they ought not to be considered as in default until they were requested by the contractor to have an estimate made; because it was as much his duty to request to have it done as it was theirs to direct the engineer to do it. Interest, therefore, if allowed upon this principle, should be computed only from the time of the refusal by the defendants when called upon, either to cause a final estimate to be made, or to correct that already made. *Judgment affirmed.*

FRAZER *v.* BIGELOW CARPET CO.

Massachusetts, 1886. 141 Mass. 126.

HOLMES, J. This is an action for the negligent destruction of property by the same disaster which was discussed in Bryant *v.* Bigelow Carpet Co., 131 Mass. 491. The defendants' liability is admitted, and the only question is whether the tribunal assessing the damages had power, in its discretion, to add interest to the sum which it found to represent the plaintiff's loss on the day it took place.

Interest was allowed, without discussion, in Bryant *v.* Bigelow Carpet Co., *ubi supra*. It is allowed as of right in trover and other like actions; and although it is suggested that, in such cases, the defendant may be presumed to have had the use of the goods since the conversion, this is not necessarily the fact, and, if it were, would have no bearing on the indemnity due the plaintiff. Interest is allowed in the Admiralty upon damages for collision, and other courts have adopted the Admiralty doctrine. Straker *v.* Hartland, 2 H. & M. 570; The Amalia, 34 L. J. Adm. 21; The Dundee, 2 Hagg. Adm. 137; The Mary J. Vaughan, 2 Ben. 47; Parrott *v.* Knickerbocker Ice Co., 46 N. Y. 361; Mailler *v.* Express Propeller Line, 61 N. Y. 312. The same principle has been applied in other cases of the negligent destruction of property. Chapman *v.* Chicago & Northwestern Railway, 26 Wis. 295, 304; Sanborn *v.* Webster, 2 Minn. 323. See also Lawrence Railroad *v.* Cobb, 35 Ohio St. 94.

Notwithstanding the language of Wood, V.C., in Straker *v.* Hartland, *ubi supra*, it may be conceded, for the purposes of this decision, that a mere liability to pay such a sum, if any, as a jury may hereafter determine, cannot properly be called a debt. Read *v.* Nash, 1 Wils. 305; Lewkner *v.* Freeman, Prec. Ch. 105; s. c. 1 Eq. Cas. Abr. 149, pl. 5; Freem. Ch. 236. Compare Kay *v.* Pennsylvania Railroad, 65 Penn. St. 269, 277. And we will assume that the sum

ultimately found by the jury cannot be said to have been wrongfully detained before the finding, in such a sense that interest is due *eo nomine*. Blogg *v.* Johnson, L. R. 2 Ch. 225, 230; Chicago *v.* Allcock, 86 Ill. 384.

But we have heard no reason suggested why, if a plaintiff has been prevented from having his damages ascertained, and, in that sense, has been kept out of the sum that would have made him whole at the time, so long that that sum is no longer an indemnity, the jury, in their discretion, and as incident to determining the amount of the original loss, may not consider the delay caused by the defendant. In our opinion they may do so; and, if they do, we do not see how they can do it more justly than by taking interest on the original damage as a measure. See further Lincoln *v.* Claflin, 7 Wall. 132, 139; and the often cited language of Shaw, C.J., in Parks *v.* Boston, 15 Pick. 198, 208; Burt *v.* Merchants' Ins. Co., 115 Mass. 1, 14; Old Colony Railroad *v.* Miller, 125 Mass. 1, 4.

It is argued that the discretion was exercised wrongly, because the delay was due to the plaintiff's not bringing his action. But he presented his claim, and was informed that the defendants denied their liability. Under such circumstances, the most prudent and economical thing for both parties was for the plaintiff to postpone his suit until a test case had settled the question. The delay for that purpose was caused by the defendants as truly as if a suit had been begun and continued to await the decision in Bryant *v.* Bigelow Carpet Co.

Judgment for the plaintiff for $4000, *and interest.*

RICHARDS *v.* CITIZENS' NATURAL GAS CO.

Pennsylvania, 1889. 130 Pa. 37.

Charles Richards brought trespass against the Citizens' Natural Gas Company to recover damages for the destruction of his household goods, caused by an explosion of natural gas

alleged to have occurred in consequence of the defendant's negligence.[1]

MITCHELL, J. Interest as such is recoverable only where there is a failure to pay a liquidated sum due at a fixed day, and the debtor is in absolute default. It cannot, therefore, be recovered in actions of tort, or in actions of any kind where the damages are not in their nature capable of exact computation, both as to time and amount. In such cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and his default is not therefore of that absolute nature that necessarily involves interest for the delay. But there are cases sounding in tort, and cases of unliquidated damages, where not only the principal on which the recovery is to be had is compensation, but where also the compensation can be measured by market value, or other definite standards. Such are cases of the unintentional conversion or destruction of property, etc. Into these cases the element of time may enter as an important factor, and the plaintiff will not be fully compensated unless he receive, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages, in the nature of interest, for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure.

These principles have been very recently affirmed by this Court in Penna., etc. R. Co. *v.* Ziemer, 124 Pa. 571, and Plymouth Tp. *v.* Graver, 125 Pa. 37; and although, as said by our brother Clark in the last case, there is some conflict in the decisions (Railroad Co. *v.* Gesner, 20 Pa. 242; Del., etc. R. Co. *v.* Burson, 61 Pa. 380; Pittsb. S. Ry. Co. *v.* Taylor, 104 Pa. 306, and Allegheny City *v.* Campbell, 107 Pa. 530), it is not so much in regard to the principles, as in the mode of expression. The contest has been whether the allowance should be made or not; and the name by which it should be called, whether interest or compensation for delay, measured

[1] The statement of facts is omitted.

by the rate of interest, received little attention, and it was incautiously said that interest was or was not to be allowed. The distinction, however, is important, for failure to observe it leads to confusion, as in the present case. Interest is recoverable of right, but compensation for deferred payment in torts depends on the circumstances of each case. The plaintiff may have set his damages so inordinately high as to have justified the defendant in refusing to pay, or in other ways the delay may be plaintiff's fault; or, the liability of defendant may have arisen without fault, as in Weir *v.* Allegheny Co., 95 Pa. 413. In such cases the jury probably would not, and certainly ought not to make the allowance. It was said by Lewis, J., in Railroad Co. *v.* Gesner, 20 Pa. 242, "the second exception raises the question whether interest can be allowed on the compensation from the time when the company took possession of the land. . . . A purchaser in possession of land under articles is bound to pay interest, unless relieved by the equity of peculiar circumstances, upon the principle that a just compensation cannot be made without paying not only the value, but interest on the value to compensate for the delay. This is the rule, unless the delay has been caused by a party claiming the interest." This was said in a case of damages for the taking of land by eminent domain; but, notwithstanding some confusion of thought in the analogy of a purchase of land under articles of agreement, and some carelessness in the use of the term "interest," it illustrates the true rule that in actions like the present, interest is not recoverable as such, and the allowance of compensation for delay depends on the circumstances, and must therefore be determined by the jury. The learned judge below inadvertently directed the jury to allow interest as a matter of law. This was a technical error, but as the amount is quite small, and the defendants in error have expressed their desire to yield it rather than have the controversy further prolonged, the judgment will not be reversed, but will be reduced by striking off the interest.

Judgment reduced nunc pro tunc, as of Nov. 17, 1888, *to* $383, *and thereupon judgment affirmed.*

LOUISVILLE & NASHVILLE RAILROAD CO. *v.* WALLACE.

Tennessee, 1891. 91 Tenn. 35.

SNODGRASS, J. The defendant in error, while in the service of the Louisville & Nashville Railroad Company as brakeman, sustained severe personal injury, resulting in the loss of a leg, which he alleged was occasioned by the negligence of the company. He sued for $15,000 damages, and recovered judgment for $9,940. The company appealed, and assigned numerous errors. It is not deemed material to notice but one of them, as the others are not well taken, and involve nothing new, so as to make their consideration in a written opinion necessary. The one material to be considered relates to the question of interest. The court told the jury it could assess plaintiff's damages with or without interest, as the jury should see proper, in connection with instructions as to the measure of damages not otherwise complained of. The verdict assessed the damages at $7,000 with seven years' interest, $2,940, aggregating $9,940. It is objected in the assignment of errors that the charge on this question, and verdict, with judgment thereon, are erroneous. This involves a consideration of the question, what is the true measure of damages for such personal injury? The rule for determining damages for injuries not resulting in death (where the statute fixes the measure), and not calling for exemplary punishment, deducible from the decisions of this court since its organization in this State, is that of compensation for mental suffering and physical pain, loss of time, and expenses incident to the injury, and, if it be permanent, the loss resulting from complete or partial disability in health, mind, or person thereby occasioned. And this is the rule most consonant to reason adopted in other States. 1 Sedg. Dam. (8th ed.) § 481 *et seq.*; 5 Amer. & Eng. Enc. Law,

pp. 40–44 and notes; Railroad Co. *v.* Read, 87 Amer. Dec. 260. As this sum in gross includes all the compensation which is requisite to cover pain, suffering, and disability to date of judgment, and prospectively beyond, it is intended to be and is the full measure of recovery, and cannot be supplemented by the new element of damages for the detention of this sum from the date of the injury. The measure of damages being thus fixed, it is expected that in determining it juries and courts will make the sum given in gross a fair and just compensation, and one in full of amount proper to be given when rendered, whether soon or late after the injury; as, if given soon, it looks to continuing suffering and disability, just as, when given late, it includes that of the past. It is obvious that damages could not be given for pain and suffering and disability experienced on the very day of trial, and then interest added for years before. These are items considered to make up the aggregate then due, and the gross sum then for the first time judicially ascertained. The error of the court below was in the assumption that a like measure of damages is applied in this class of cases as in that of injury to property effecting its destruction or conversion or other unlawful or fraudulent misappropriation, or detention of property or money, in which the rule applied by the Circuit Judge is held to be a proper one; not on the theory, even in this class of cases, that interest as such is due, but that the plaintiff is entitled to the fixed sum of money or definite money value of property converted or destroyed, and the jury may give as damages an amount equal to interest on the value of the property. But such rule applies alone to such cases, and not to that of personal injury, which does not cease when inflicted, and is not susceptible of definite and accurate computation. It never creates a debt, nor becomes one, until it is judicially ascertained and determined. Only from that time can it draw interest; and interest or damages cannot at any preceding time be added to it without changing and superadding a new element, never given in this State or any other in a similar case, so far as our investigation has

discovered. The counsel of plaintiff, who cite many authorities supposed to be in support of the ruling below, were doubtless misled by the generality of terms used in some of them. Under the head of "Interest," after stating that "it was generally allowed by law on two grounds, namely, on contract, express or implied, or by way of damages either for default in payment of a debt or for a use or benefit derived from the money of another," it is stated in 11 Amer. & Eng. Enc. Law that, "where it is imposed to punish tortious, negligent, or fraudulent conduct, it is a question within the discretion of the jury" (p. 380). For this proposition various authorities are cited, including Mr. Sedgwick on Damages, p. 374 (the reference being to paging of the fifth or earlier edition). This author uses similar general terms, but neither was speaking of cases of personal injury, but of the class of cases to which we have referred, as fully appears from Mr. Sedgwick's further discussion of this general head, on pages 385, 386, and as most clearly appears from a reference to the authorities cited by both, which relate to cases of trover and trespass, and to property controversies only. In neither of these books is the proposition now thought to be sustained by them advanced, — that the measure of damages for a personal injury includes damages for detention of the supposed amount due. The generality of statement indulged in that and former editions of this work is corrected by editors of the last edition. Chapter X. of the first volume of this edition is devoted to interest allowed in actions where it is by rule of law, or in the discretion of the jury or court trying the case, allowed as part of the measure of damages. In these cases are enumerated and discussed those actions sounding in tort in which interest may be given as damages. The distinction is there taken, as taken here, and actions for personal injuries excluded, because of the existence of a wholly different measure of damages respecting them. In this connection we quote section 320 in the volume and chapter referred to: "It sufficiently appears, from what has already been said, that there is no general principle which

prevents the recovery of interest in actions of tort. The fact that the demand is unliquidated has been shown to be insufficient to exclude interest, and there is nothing in the mere form of the action which renders it unreasonable that interest should be given. Nevertheless it is in the region of tort that we find the clearest cases for disallowance of interest. There are many cases which are not brought to recover a sum of money representing a property loss of the plaintiff, and it is frequently said broadly that interest is not allowed in such actions. It is certainly not allowed in such actions as assault and battery, or for personal injury by negligence, libel, slander, seduction," etc. The measure of damage in such case seems nowhere to include this or be based upon this idea. Even in respect to injury or destruction of property, where the Supreme Court of the United States has adopted fully the prevailing rule allowing damages in the form of interest on value of the property, the rule has been limited to such injury of property or property right as had a fixed or certain value; and it is accordingly held in that court that indefinite damages, as that resulting from infringement of a patent, could not bear interest until after the amount had been judicially ascertained. Tilghman *v.* Proctor, 125 U. S. 161, 8 Sup. Ct. Rep. 894.

The direct question we are considering also came before the Supreme Judicial Court of Maine, and it was there held that the rule permitting damages equal to interest on value of property in cases of trespass and trover did not apply, and that interest could not be allowed upon a recovery for personal injury, and that, too, under a statute authorizing a recovery "to the amount of the damage sustained" (this not material, however, as their statute gave no more nor less right than exists here). Sargent *v.* Hampden, 38 Me. 581. The cases cited by the editors of the last edition of Sedgwick on Damages sustaining the proposition that interest cannot be included in a recovery of damages for personal injuries are from Georgia and Pennsylvania. Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. Rep. 684; Railroad Co. *v.* Young, 81

Ga. 397, 7 S. E. Rep. 912; Railway Co. *v.* Taylor, 104 Pa. St. 306. These cases have all been examined, and fully sustain the text. One of the cases cited to the proposition in Amer. & Eng. Enc. Law was a Pennsylvania case, earlier than either of those to which we have referred. The case there cited (Fasholt *v.* Reed, 16 Serg. & R. 266), which we have not been able to find in libraries here, was evidently not one of personal injury, or else not consistent with later holdings of that court. Indeed the Pennsylvania court seems hardly to have gone as far on that question in reference to allowance of interest as damages in other actions *ex delicto* as other courts. In suits for the destruction of property that court has held that, while lapse of time may be looked to, it is error to instruct the jury that plaintiff is entitled to interest on such damage from the time it occurred. Township of Plymouth *v.* Graver, 125 Pa. St. 24, 17 Atl. Rep. 249; Emerson *v.* Schoonmaker, 135 Pa. St. 437, 19 Atl. Rep. 1025. Of the other cases cited in Amer. & Eng. Enc. Law, we have examined those in 13 Wis. 31 (Hinckley *v.* Beckwith), 36 N. Y. 639 (Vandevoort *v.* Gould), and 30 Tex. 349 (Wolfe *v.* Lacy). They all sustain the text as it is intended to be understood, and as we have herein explained, and doubtless the other cases do so. To the same effect are the cases of Lincoln *v.* Claflin, 7 Wall. 132; Dyer *v.* Navigation Co., 118 U. S. 507, 6 Sup. Ct. Rep. 1174; U. S. *v.* North Carolina, 136 U. S. 211, 10 Sup. Ct. Rep. 920; Clement *v.* Spear, 56 Vt. 401; and cases from American decisions and reports cited in Rapalje's Digest, volume 1, pp. 1039–1041, under heads "Trover," and "When Interest may be Added," and volume ii. p. 1991, under head of "Interest." See, also, 1 Sedg. Dam. §§ 432–493 (8th ed.). The effect and meaning of statements quoted from Amer. & Eng. Enc. Law, and its reference to Sedg. Dam. are made perfectly clear when these cases and authorities herein added are examined, and the generality of expressions limited to the purpose of their use, and the class of cases being considered. They were not dealing at all, nor intended to be understood as dealing, with the

question of recovery for personal injuries, which is itself a recovery of damages pure and simple, and measured by a rule which needs no supplement that would add damages to damages. The charge and verdict were therefore erroneous on this point, and prejudicial to defendant to the extent and only to the extent of the injury. The Circuit Judge might have refused to receive the verdict as to interest, and the same effect may now follow a remitting of the interest by plaintiff, if he elects to do so. In that event the plaintiff is entitled to a judgment for $7000, with interest from date of its rendition, and costs, and with this modification the judgment will be affirmed. This was the practice adopted in the Maine case on this point, as well as in one of the Pennsylvania cases (135 Pa. St. 437, 19 Atl. Rep. 1025), citing several others, and is clearly the correct rule. In default of such remission, a new trial will be granted.

OLD COLONY RAILROAD *v.* MILLER.

Massachusetts, 1878. 125 Mass. 1.

Colt, J.[1] The right of the land-owner to damages for land taken by a railroad corporation is complete when the location is made. That act constitutes the taking. It is the loss occasioned by the exercise of the right of eminent domain at that time, for which the statutes provide indemnity. The amount is then due, and, if agreed upon by the parties, must be then paid. If not agreed on, the damages are assessed by a jury on the application of either party; but they are assessed as of the time of the location, and the jury may properly allow interest upon the amount ascertained as damages, for the detention of the money from the time of the taking.

[1] Part of the opinion is omitted.

SOUTH PARK COMMISSIONERS *v.* DUNLEVY.

Illinois, 1878. 91 Ill. 49.

CRAIG, C.J.[1] This was a proceeding, instituted in the Circuit Court of Cook County, by the South Park Commissioners, for the condemnation of two certain tracts of land, containing twenty acres each, for park purposes. . . .

The question presented by the record is, whether the court erred in instructing the jury to allow interest on the value of the property from the time the petition was filed until the trial. It is insisted by the defendants that it is inequitable to have their property taken from them and not allow interest from the time of the taking. The commissioners had no right to take the property or to disturb the defendants in the enjoyment of the possession thereof, until the damages had been ascertained in the mode provided by law, and paid. The filing of a petition to condemn property is not a taking of the same. If the commissioners took possession of defendants' property before the damages were assessed and paid, they were trespassers, for which the law gives an ample remedy. There is some slight evidence in the record tending to prove that the commissioners assumed control over the property, but there was no issue of that kind in the case, and the instruction is not predicated on the existence of that fact. The evidence, therefore, bearing upon that point, we do not regard of any importance. The defendants had the right to the possession and use of their property after the petition was filed, the same as before, and we perceive no reason why they should have the use of the property and at the same time be allowed interest upon its value, before it was actually taken.

[1] Part of the opinion is omitted.

BRANNON *v.* HURSELL.

Massachusetts, 1873. 112 Mass. 63.

Contract against John C. Hursell and Horace Humphrey on a promissory note.[1]

Morton, J. One question of practical importance as to the amount of Humphrey's liability, remains to be considered. The rate of interest specified in the note is ten per cent, and the plaintiff claims interest at that rate since the maturity of the note. We are of opinion that he is entitled to recover it. The legal rate of interest is six per cent, in the absence of any agreement for a different rate; but it is lawful for parties to contract to pay and receive a different rate, and when the agreement to pay a greater rate is in writing, it can be recovered by action. St. 1867, c. 56. In the case at bar, the defendants have agreed in writing that the rate of interest for the use of the plaintiff's money shall be ten per cent. The plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an incident or part of the debt, and is entitled to the rate fixed by the contract. Ayer *v.* Tilden, 15 Gray, 178; Morgan *v.* Jones, 8 Exch. 620; Keene *v.* Keene, 3 C. B. (n. s.) 144; Miller *v.* Burroughs, 4 Johns. Ch. 436.

Exceptions overruled.

EATON *v.* BOISSONNAULT.

Maine, 1877. 67 Maine, 540.

Walton, J. The question is, what rate of interest shall be allowed on notes after they have matured.

When it is expressly stated in a note that if it is not paid at maturity, it shall thereafter bear interest at a rate named, the rate named is recoverable, although it is much larger than

[1] The statement of facts and part of the opinion are omitted.

the usual or statutory rate. So held in Capen *v.* Crowell, 66 Maine, 282.

When a note is made payable at a future day, with interest at the rate of three per cent per annum, and nothing is said therein about the rate of interest which it shall draw thereafter, if not paid at maturity, it will draw the interest named till maturity, and after that the usual or statutory rate. So held in Ludwick *v.* Huntzinger, 5 Watts & Serg. 51.

A note payable at a future day, with interest at two per cent a month, in which nothing is said about the rate of interest after maturity, will draw that rate of interest till the note matures, and after that only the usual or statutory rate. So held in Brewster *v.* Wakefield, 22 Howard, 118, and in Burnhisel *v.* Firman, 22 Wall. 170.

The same rule was acted upon in the House of Lords in England in a recent case. Cook *v.* Fowler, L. R. 7 H. L. 27.

The reason given by Lord Selborne, in the case last cited, is that interest for the delay of payment, *post diem*, is not given on the principle of implied contract, but as damages for a breach of contract; that while it might be reasonable, under some circumstances, and the debtor might be very willing to pay five per cent per month for a very short time, it would by no means follow that it would be reasonable, or that the debtor would be willing to pay, at the same rate, if, for some unforeseen cause, payment of the note should be delayed a considerable length of time.

Similar views were expressed by Chief Justice Taney, in Brewster *v.* Wakefield, 22 How. 118. He says that when the note is entirely silent as to the rate of interest thereafter, if it is not paid at maturity, the creditor is entitled to interest after that time by operation of law and not by virtue of any promise which the debtor has made; that if the right to interest depended upon the contract, the holder would be entitled to no interest whatever after the day of payment.

In a recent case in Massachusetts, the court held that when a recovery is had upon a note bearing ten per cent interest, the plaintiff is entitled to interest at the same rate

till the time of verdict. Brannon *v.* Hursell, 112 Mass. 63. The reason given is that "the plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an incident or part of the debt, and is entitled to the rate fixed by the contract." This reasoning is at variance with the reasoning in the House of Lords in the case cited; and with the reasoning of the Supreme Court of the United States, in the cases cited; and with the reasoning of the Massachusetts court itself, in Ayer *v.* Tilden, 15 Gray, 178. It is there said that the interest after maturity "is not a sum due by the contract; that it is given as damages for the breach of the contract, and must follow the rule in force within the jurisdiction where judgment is recovered."

We think the rule laid down by the Supreme Court of the United States, and by the House of Lords in England, is the correct one. It has been followed in Connecticut. Hubbard *v.* Callahan, 42 Conn. 524. And in Rhode Island. Pierce *v.* Swanpoint Cemetery, 10 R. I. 227. In the last case the court say that if the parties to the note or other contract for the payment of money, intend that it shall carry the stipulated rate of interest till paid, they can easily entitle themselves to it, by saying so, in so many words. The practice in this State has been in accordance with the rule laid down by the Supreme Court of the United States, in Brewster *v.* Wakefield, 22 Howard, 118; and we see no reason for departing from it. *Exceptions overruled.*

BICKFORD *v.* RICH.

Massachusetts, 1870. 105 Mass. 340.

Morton, J. The defendant, having been adjudged trustee of the plaintiff, and having paid upon the judgment against him twenty-five dollars, is by the express provisions of the statute discharged from all demand by the plaintiff to the amount of such payment. Gen. Sts. c. 142, § 37. The plaintiff is not entitled to any judgment, unless he shows that

some amount is due him for interest upon the bill against the defendant, which has accrued since this suit was commenced. It does not appear that the bill due by the defendant bore interest by reason of any contract or promise to pay interest. On the contrary, the agreed statement finds that "any interest that may be due is due as damages resulting from nonpayment, or the delay in payment." This being so, the case of Oriental Bank *v.* Tremont Insurance Co., 4 Met. 1, is decisive against the plaintiff's claim of interest. The defendant has not promised to pay interest; he was prevented by the law from paying the principal; and he is in no fault for not paying it, and ought not to be charged with interest as damages for nonpayment.

Judgment for the defendant.

HENRY *v.* FLAGG.

Massachusetts, 1847. 13 Met. 64.

DEWEY, J. The case of Hastings *v.* Wiswall, 8 Mass. 455, early settled the principle, that upon a note, payable in a certain number of years with annual interest, judgment could be recovered only for simple interest on the principal sum. The question there arose, upon a motion in behalf of the plaintiff, that in entering up the judgment, the interest due by the terms of the note at the expiration of each year should be added to the principal, and interest be cast upon the aggregate, and so from year to year; but this was refused, and simple interest on the principal sum only was allowed by the court. This opinion was reaffirmed, or rather recognized as the existing rule of law, by C. J. Parker, in Barrell *v.* Joy, 16 Mass. 227. It was also somewhat considered in the case of Wilcox *v.* Howland, 23 Pick. 167, where it was again held that an action will not lie to recover interest upon interest, although a new contract, made after such interest had accrued (as in the case of a promissory note given for compound interest), would be a valid promise, and

might be enforced. These cases seem to settle the general principle as to the right to enforce payment of compound interest upon antecedent contracts, and would preclude a recovery of such interest in the ordinary case of a promise to pay compound interest.

The only further inquiry is, therefore, whether this case falls within the principles settled in the adjudicated cases. It is supposed by the plaintiff that there are elements in the present case, that will materially distinguish it from those alluded to. It is true that the promise, which is the subject of the present action, is a promise to pay the annual interest of certain notes of Elijah Flagg and Joshua Flagg, if the makers of those notes do not make such annual payment of interest. The makers of those notes are not sued, but the party giving the collateral promise to pay annual interest. We perceive no distinction, however, in the principle of the two cases. As a prospective promise to pay compound interest, it is equally objectionable as if made by the makers of the note. The payment of interest on the whole sum might have been enforced by action to enforce the payment of the same at the end of each year, if the plaintiff had seen fit so to do. Not having done so, it is as much to be presumed in this as in the cases of annual interest stipulated for in the note itself, that the party waives such claim for annual interest. Indeed, the same objection, whether it be that of waiver, or that the policy of the law is adverse to compound interest, applies to both cases. The plaintiff, having received the simple interest upon the principal of the notes, which are the subject of the defendant's promise, and having forborne to enforce against the defendant the payment of annual interest from year to year, as he might have done, cannot now enforce the payment of compound interest.

Judgment for the defendant.

AURORA *v.* WEST.

United States Supreme Court, 1868. 7 Wall. 82.

CLIFFORD, J.[1] Exceptions were taken to the ruling of the court in allowing interest upon the coupons, and the bill of exceptions states that the exception of the defendants was allowed, but it does not state what amount of interest was included in the judgment, nor give the basis on which it was computed. Judging from the amount of the sum found due, it is, perhaps, a necessary inference that interest was allowed on each coupon from the time it fell due to the date of the judgment, and, if so, the finding was correct.

Bonds and coupons like these, by universal usage and consent, have all the qualities of commercial paper. Mercer *v.* Hacket, 1 Wallace, 83; Meyer *v.* Muscatine, Ib. 384. Coupons are written contracts for the payment of a definite sum of money on a given day, and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, it is held that they are negotiable, and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached. Knox Company *v.* Aspinwall, 21 Howard, 544; White *v.* Railroad, 21 Howard, 575; McCoy *v.* County of Washington, 7 American Law Register, 193; Parsons on Bills and Notes, 115. Interest, as a general rule, is due on a debt from the time that payment is unjustly refused, but a demand is not necessary on a bill or note payable on a given day. Vose *v.* Philbrook, 3 Story, 336; Hollingsworth *v.* Detroit, 3 McLean, 472. Being written contracts for the payment of money, and negotiable because payable to bearer and passing from hand to hand, as other negotiable instruments, it is quite apparent on general principles that they should draw interest after payment of the principal is unjustly neglected or refused. Dela-

[1] Part of the opinion is omitted.

field *v.* Illinois, 2 Hill, 177; Williams *v.* Sherman, 7 Wendell, 112. Where there is a contract to pay money on a day fixed, and the contract is broken, interest, as a general rule, is allowed, and that rule is universal in respect to bills and notes payable on time. 2 Parsons on Bills and Notes, 393. Governed by that rule, this court, in the case of Gelpcke *v.* Dubuque, 1 Wallace, 206, held that the plaintiff, in a case entirely analogous, was entitled to recover interest. Thomson *v.* Lee County, 3 Wallace, 332.

CHAPTER XIII.

DAMAGES IN CERTAIN ACTIONS OF TORT.

BENNETT *v.* LOCKWOOD.

New York, 1838. 20 Wend. 223.

NELSON, C.J. The defendant took the horse and wagon of the plaintiffs wrongfully, and used them, by reason of which taking the plaintiffs were induced to believe that the person to whom they had hired it temporarily had absconded, and therefore they went in pursuit of their property, and expended time and money. It is insisted for the plaintiff in error that the Common Pleas erred in allowing the plaintiffs to recover for the time spent and expenses incurred, on the ground that the damages thus claimed were not the natural or necessary consequence of the wrongful taking. Admitting the counsel for the plaintiff to be right in this proposition, it is no objection to the recovery if the damages were proximate and not too remote, and were claimed in the declaration. 1 Chitty's R. 333; 1 Saund. Pl. and Ev. 136. Here the damages were duly claimed; they occurred in the use of reasonable means on the part of the plaintiffs to repossess themselves of their property, and were occasioned by the wrongful act of the defendant.

Judgment affirmed.

ELLIS *v.* HILTON.

Michigan, 1889. 78 Mich. 150.

LONG, J. This is an action to recover damages against the defendant for negligently placing a stake in a public

street in Traverse City, which plaintiff's horse ran against, and was injured. It was conceded on the trial by counsel for defendant that the horse of plaintiff was so injured that it was entirely worthless. Plaintiff claimed damages, not only for the full value of the horse, but also for what he expended in attempting to effect a cure, and on the trial stated to the court that plaintiff was entitled to recover a reasonable expense in trying to cure the horse before it was decided that she was actually worthless. The court ruled, however, that the damages could not exceed the value of the animal. A claim is made by the declaration for moneys expended in trying to effect a cure of the horse after the injury. Upon the trial the plaintiff testified that he put the horse, after the injury, into the hands of a veterinary, and paid him $35 for cure and treatment. On his cross-examination, he also testified that the veterinary said "there was hopes of curing her, if the muscles were not too badly bruised. He did n't say he could cure her. He thought there was a chance he might."

Dr. DeCow, the veterinary, was called, and testified, as to the injury, that the stake entered the breast of the horse, on the left side, about six inches; that the muscles were bruised, and the left leg perfectly helpless. He got the wound healed, but on account of the severe bruise of the muscles the leg became paralyzed and useless. On being asked whether he thought she could be helped when he first saw her, he stated that he did not know but she might; that she might be helped, and kept for breeding purposes, and be of some value.

It is evident from the testimony that the plaintiff acted in good faith in attempting the cure, and under the belief that the mare could be helped, and be of some value. The court below, however, seems to have based its ruling that no greater damages could be recovered than the value of the animal, and that these moneys expended in attempting a cure could not be recovered, upon the ground that the defendant was not consulted in relation to the matter of the attempted cure. Whatever damages the plaintiff sus-

tained were occasioned by the negligent conduct of the defendant, and recovery in such cases is always permitted for such amount as shall compensate for the actual loss. If the horse had been killed outright, the only loss would have been its actual value. The horse was seriously injured; but the plaintiff, acting in good faith, and in the belief that she might be helped and made of some value, expended this $35 in care and medical treatment. He is the loser of the actual value of the horse, and what he in good faith thus expended. He is permitted to recover the value, but cut off from what he has paid out. This is not compensation.

Counsel for defendant contends that such damages cannot exceed the actual value of the property lost, because the loss or destruction is total. There may be cases holding to this rule; but it seems to me the rule is well stated, and based upon good reason, in Watson *v.* Bridge, 14 Me. 201, in which the court says: "Plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood that it was an expense prudently incurred, in the reasonable expectation that it would prove beneficial. It was incurred, not to aggravate, but to lessen the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our judgment, that they should sustain the loss." In Murphy *v.* McGraw, 41 N. W. Rep. 917, it appeared on the trial that the horse was worthless at the time of purchase by reason of a disease called "eczema." The court charged the jury that if the plaintiff was led by defendant to keep on trying to cure the horse the expense thereof would be chargeable to the defendant, as would also be the case if there were any circumstances, in the judgment of the jury, which rendered it reasonable that he should keep on trying as long as he did to effect the cure. The plaintiff recovered for such expense, and on the hearing here the charge of the trial court was held correct.

It is a question, under the circumstances, for the jury to determine whether the plaintiff acted in good faith, and upon a reasonable belief that the horse could be cured, or made of some value, if properly taken care of; and the trial court was in error in withdrawing that part of the case from them. Such damages, of course, must always be confined within reasonable bounds, and no one would be justified, under any circumstances, in expending more than the animal was worth in attempting a cure. This is the only error we need notice. The judgment of the court below must be reversed, with costs, and a new trial ordered.

LAWRENCE *v.* HAGERMAN.

Illinois, 1870. 56 Ill. 68.

Scott, J.[1] The action is founded in tort, for maliciously suing out the process of a court. The averment in the declaration is, that the appellant "wrongfully, unjustly, and maliciously, and without probable cause therefor," sued out a writ of attachment under the attachment act, and with a malicious and wrongful purpose caused the same to be levied on the goods and chattels of the appellee. It is alleged that, by reason of the premises, the appellee sustained special damage in the depreciation of the value of the property levied on, and in the expenditure of large sums of money in the defence of the action, and, as general damage, that his business was broken up, his credit and reputation impaired and destroyed.

The testimony offered to which objections were interposed tended to show, negatively at least, that there was no probable cause for suing out the writ. This was a material averment and it was necessary to be proven. The evidence offered for that purpose was legitimate and proper.

[1] Part of the opinion is omitted.

The main objection taken is to the evidence offered to establish the measure of damages. It seems to us that the averments in the declaration are broad and comprehensive enough to admit of evidence of all the injuries sustained in consequence of the wrongful act alleged. For the purpose of estimating the extent and magnitude of the injury, the court permitted the appellee to introduce evidence of the nature, character, and amount of business transacted at and before the date of the wrongful levy, and also evidence of the complete destruction of that business, and of the extent to which the credit and financial reputation of the appellee were impaired, and also evidence of the actual loss of the stock levied on, and of the expenses incurred in and about the defence of the suit. No reason is perceived why these facts do not constitute proper elements for the consideration of a jury in estimating the damages occasioned by the tortious act of the appellant. The evidence was pertinent to the issue made by the pleadings, and the issue stated was broad enough to admit the proof.

In actions on the case the party injured may recover from the guilty party for all the direct and actual damages of the wrongful act and the consequential damages flowing therefrom. The injured party is entitled to recover the actual damages and such as are the direct and natural consequence of the tortious act.

In this instance the amount of money actually paid out in and about the defence of the suit, and the depreciation of the value of the stock on which the wrongful levy is alleged to have been made, are not the only damages sustained, if the appellant wrongfully, unjustly, and maliciously and without probable cause sued out the writ of attachment, and caused the same to be levied in the manner charged. The business of the appellee had hitherto been prosperous, his credit and financial reputation good, and all were destroyed by the malicious acts of the appellant, if it be conceded that he was guilty as alleged. It cannot be said that the law will afford no redress for the destruction of financial credit and reputa-

tion, or mete out no measure of punishment to the guilty party who wantonly and maliciously destroys them. The reputation and credit of a man in business is of great value, and is as much within the protection of the law as property or other valuable rights. And if it be true that the appellant has maliciously, by his wrongful act, destroyed the business, credit, and reputation of the appellee, the law will require him to make good the loss sustained. Chapman *v.* Kirby, 49 Ill. 211.

The instructions given for the appellee announce these principles with sufficient accuracy. The jury were correctly told that in estimating the damages they might take into consideration any injury shown by the evidence that the appellee sustained in his business and reputation, together with the losses actually sustained by the wrongful suing out of the writ of attachment. The jury were also instructed that they were not confined to the actual damages, if the wrongful acts were wantonly and maliciously committed, but they might give exemplary damages. Such is the well-established rule of the law.

MORSE *v.* HUTCHINS.

Massachusetts, 1869. 102 Mass. 439.

Tort for deceit in making false and fraudulent representations to the plaintiff touching the business and profits of a firm of which the defendant was a member, and thereby inducing the plaintiff to buy the interest of the defendant in the stock and good will of the firm.

Gray, J.[1] The rule of damages was rightly stated to the jury. It is now well settled that, in actions for deceit or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was

[1] Part of the statement of facts and part of the opinion are omitted.

represented or warranted to be. Stiles *v.* White, 11 Met. 356; Tuttle *v.* Brown, 4 Gray, 457; Whitmore *v.* South Boston Iron Co., 2 Allen, 52; Fisk *v.* Hicks, 11 Foster, 535; Woodward *v.* Thacher, 21 Verm. 580; Muller *v.* Eno, 4 Kernan, 597; Sherwood *v.* Sutton, 5 Mason, 1; Loder *v.* Kekulé, 3 C. B. (N. S.) 128; Dingle *v.* Hare, 7 C. B. (N. S.) 145; Jones *v.* Just, Law Rep. 3 Q. B. 197. This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him. To allow to the plaintiff (as the learned counsel for the defendant argued in this case) only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrong-doer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract. The fact that the property sold was of such a character as to make it difficult to ascertain with exactness what its value would have been if it had conformed to the contract affords no reason for exempting the defendant from any part of the direct consequences of his fraud. And the value may be estimated as easily in this action as in an action against him for an entire refusal to perform his contract.

Exceptions overruled.

SMITH *v.* BOLLES.

Supreme Court of the United States, 1889. 132 U. S. 125.

Fuller, C.J. The bill of exceptions states that the court charged the jury "as to the law by which the jury were to be governed in the assessment of damages under the issues made in the case," that "the measure of recovery is generally the difference between the contract price and the reasonable

market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence before you."

In this there was error. The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery.

Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact,

that would necessarily be applied in reduction of the damages. "The damage to be recovered must always be the natural and proximate consequence of the act complained of," says Mr. Greenleaf, vol. ii. § 256; and "the test is," adds Chief Justice Beasley, in Crater *v.* Binninger, 33 N. J. Law (4 Vroom), 513, 518, "that those results are proximate which the wrong-doer from his position must have contemplated as the probable consequence of his fraud or breach of contract." In that case, the plaintiff had been induced by the deceit of the defendant to enter into an oil speculation, and the defendant was held responsible for the moneys put into the scheme by the plaintiff in the ordinary course of the business, which moneys were lost, less the value of the interest which the plaintiff retained in the property held by those associated in the speculation. And see Horne *v.* Walton, 117 Illinois, 130; Same *v.* Same, 117 Illinois, 141; Slingerland *v.* Bennett, 66 N. Y. 611; Schwabacker *v.* Riddle, 84 Illinois, 517; Fitzsimmons *v.* Chipman, 37 Mich. 139.

We regard the instructions of the court upon this subject as so erroneous and misleading as to require a reversal of the judgment. The five causes of action covered the purchase of nine thousand five hundred and twenty-five shares of stock, for which $16,050 in the aggregate had been paid. The plaintiff did not withdraw either of his five counts, or request the court to direct the jury to distinguish between them. The verdict was a general one for $8140, and, while it may be quite probable that the jury did in fact, as counsel for defendant in error contends, award to the plaintiff, under his first cause of action, the sum he had paid for the shares he had purchased himself and interest, we cannot hold this as matter of law to have been so; nor can we determine what influence the erroneous advice of the learned judge may have had upon the deliberations of the jury.

Other errors are assigned, which we think it would subserve no useful purpose to review. They involve rulings, the exceptions to which were not so clearly saved as might have

been wished, had the disposal of this case turned upon them, and which will not probably, in the care used upon another trial, be repeated precisely as now presented.

For the error indicated,

The judgment is reversed and the cause remanded with a direction to grant a new trial.[1]

DEMAREST *v.* LITTLE.

New Jersey, 1885. 47 N. J. L. 28.

Magie, J. This action was brought to recover damages for the death of plaintiffs' testator, which occurred in the disaster at Parker's Creek bridge, on the Long Branch Railroad, on June 29, 1882. Defendant was charged with responsibility therefor as receiver of the Central Railroad Company of New Jersey, and as having, in that capacity, contracted to carry deceased with due care.

The case was first tried in 1883, and a verdict rendered for plaintiffs, assessing their damages at $30,000. This verdict was afterwards set aside upon a rule to show cause. No opinion was delivered, but the court announced that a new trial was allowed because the damages were excessive. The case has been again tried, and the verdict has been again rendered for plaintiffs, assessing their damages at $27,500.

[1] "The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares. Before he was induced to buy the shares, he had the £4000 in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over that £4000, and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendants was having the shares instead of having in his pocket the £4000. The loss, therefore, must be the difference between his £4000 and the then value of the shares." Cotton, L.J., in Peek *v.* Derry, 37 Ch. Div. 541, 591.

"His actual loss does not include the extravagant dreams which proved illusory, but the money he has parted with without receiving an equivalent therefor." Williams, J., in High *v.* Berret, 148 Pa. 261, 264 (1892).

A rule to show cause was allowed and is now sought to be made absolute upon the following grounds: first, that the evidence was not sufficient to justify the conclusion that testator's death was due to negligence or want of care; second, that if so, defendant, as receiver, was not liable for any negligence except his own, while the alleged negligence was that of employees; and third, that the damages awarded are excessive.

Upon the first ground it was urged that the evidence upon this trial was variant from and more favorable to defendant than that produced on the former trial. Whether that be so or not, a careful perusal of the evidence satisfies me that there was sufficient to warrant the conclusion that testator's death was due to negligence or want of proper care.

The second objection has already been disposed of in a case growing out of this same disaster, and in which the Court of Errors has affirmed the responsibility of the receiver for such negligence. Woodruff's Adm'r *v.* Little, Receiver, 17 Vroom, 614. The verdict ought not to be disturbed on those grounds.

The question presented by the claim that the damages are excessive is of more difficulty. The action is created by statute which supplies the sole measure of the damages recoverable therein. They are to be determined exclusively by reference to the pecuniary injury resulting to the widow and next of kin of deceased by his death. The injury to be thus recovered for has been defined by this court to be "the deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of deceased." Paulmier *v.* Erie Railway Co., 5 Vroom, 151. Compensation for such deprivation is therefore the sole measure of damage in such cases. A difficult task is thereby imposed upon a jury, for they are obliged to determine probabilities, and "must, to a large extent, form their estimate of damages on conjectures and uncertainties." But the case in hand seems to present less complicated problems than other cases of the same nature.

Deceased left no widow, and but three children. All of them had reached maturity. Two sons were self-supporting; the daughter was married. He owed no present duty of support, and there is nothing to show any fixed allowance or even casual benefactions to them. They were therefore deprived of no immediate pecuniary advantage derivable from him. At his death he was in business, in partnership with his sons and son-in-law. All the partners gave attention to the business, and the capital was furnished by deceased. His death dissolved the partnership, and deprived the surviving partners of such benefit as they had derived from his credit, capital, skill, and reputation. But the injury thus resulting is not within the scope of this statute, which gives damages for injuries resulting from the severance of a relation of kinship and not of contract. No damages could be awarded on that ground.

Defendants strenuously urge that, outside of the partnership, or in the event of its dissolution, the next of kin had a reasonable expectation of deriving from the parental relation an advantage by way of services rendered or counsel given by deceased in their affairs. A claim of this sort must be carefully restricted within the limits of the statute. The counsels of a father may, in a moral point of view, be of inestimable value. The confidential intercourse between parent and child may be prized beyond measure, and its deprivation may be productive of the keenest pain. But the legislature has not seen fit to permit recovery for such injuries. It has restricted recovery to the pecuniary injury; that is, the loss of something having pecuniary value.

Now it may with some reason be anticipated that a father, out of love and affection, might, if circumstances rendered it proper, perform gratuitous service for a child, which, by rendering unnecessary the employment of a paid servant, would be of pecuniary value, and that he might, by advice in respect to business affairs, be of a possible pecuniary benefit. But whether such an anticipation is reasonable or not must depend on the circumstances. Considering the age, the

assured position, the business and other relations of these children, it is obvious that the probability of any pecuniary advantage to accrue to them in these modes was very small. Indeed, it would not be too much to say that resort must be had to speculation to discover any such advantage. At all events, compensation for this injury in this case could not exceed a small sum without being excessive.

The principal basis for plaintiffs' claim is obviously this: that the death of deceased put an end to accumulations which he might have thereafter made and which might have come to the next of kin. Deceased had accumulated about $70,000, all of which, except $10,000 capital invested in the business, seems to have been placed in real estate and securities as if for permanent investment. By his will the bulk of his property was given to his children. At his death he had no other sources of income than his investments and his business.

In determining the probability of accumulations by deceased if he had continued in life, no account should be taken of the income derivable from his investments. These have come in bulk to the children, who may, if they choose, accumulate such income. A deprivation of the probability of his accumulating therefrom is no pecuniary injury. On the contrary, it is rather a benefit to them to receive at once the whole fund in lieu of the mere contingency or probability of receiving it, though with its accumulations (at best uncertain) in the future. Indeed, the benefit thus accruing to the next of kin in receiving at once this whole property, in the view of one of the court, is at least equivalent to the present value of the probability of their receiving it hereafter, if deceased had continued in life, with all his probable future accumulations from any source whatever, in which case it is evident that his death has not resulted in any pecuniary injury to them. But without adopting this view of the evidence, it is plain that in determining probable future accumulations attention should be restricted to such as would arise from the labor of deceased in his business. His

receipts from the business for the two years it had been conducted were proved. What he expended was not proved, but left to be inferred from his mode of life. At death he was about fifty-six and a half years old, and by the proofs had an expectation of life of sixteen and seven-tenths years.

From these facts the jury were to find what deceased would probably have accumulated, what probability there was that his next of kin would have received his accumulations, and then what sum in hand would compensate them for being deprived of that probability. In what manner the jury attempted to solve this problem we cannot ascertain. Plaintiffs' counsel attempts to show the correctness of the result reached, by calculation. He assumes the income of deceased from his business during the last year as the annual income likely to be obtained, and deducts only $1,000 each year as the probable expenditure of deceased, and then finds the present worth of the net income so determined for the deceased's expectation of life is $27,710.32.

This calculation tests the propriety of this verdict, and in my judgment conclusively shows that it was rather the result of sympathy or prejudice than a fair deduction from the evidence. For, assuming the amount attributable to the loss of deceased's services was but small (and if more it was excessive), the award of the jury on this account was but a few hundred dollars less than the present worth of the full net income if received for his full expectancy of life. To reach such a result the jury must have found every one of the following contingencies in favor of the next of kin, viz.: that deceased, who had already acquired a competence, would have continued in the toil of business for his full expectancy of life; that he would have retained sufficient health of body and vigor of mind to enable him to do so, and as successfully as before; that he would have been able to avoid the losses incident to business, and would have safely invested his accumulations; and that the next of kin would have received such accumulations at his death. A

verdict which attributes no more weight than this has, to the probability that one or more of all these contingencies would happen, cannot have proceeded from a fair consideration of the case made by the evidence.

Having reached this conclusion, what should be the result as to the verdict?

The charge of the court below declared the rule of damages with accuracy. The verdict is a second one, and somewhat smaller than that previously set aside as excessive. It is unusual to set aside a second verdict, but though unusual it is within the power of the court in the exercise of its discretion. That power will be discreetly used in setting aside any verdict which does palpable injustice.

To obviate, if possible, the necessity of another trial, it has been determined that if plaintiffs will reduce their verdict to $15,000 by remitting the excess, the verdict may stand for that sum, and the rule to show cause be discharged. Unless they consent to such remission, the rule must be made absolute.

CHAPTER XIV.

DAMAGES IN CERTAIN ACTIONS ON CONTRACTS.

BROWN *v.* MULLER.

Exchequer, 1872. L. R. 7 Ex. 319.

KELLY, C.B.[1] I should not have felt much doubt as to what should be the measure of damages in this case, but for the hesitation expressed during the argument by my brother Martin; a hesitation which, however, I understand now to be removed. The defendant undertook in this case to deliver 500 tons of iron during the months of September, October, and November, 1871, in about equal portions; that is, at the rate of about 166 tons in each month; and he has failed to deliver altogether. Now the proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed. This being the general principle of assessment, we find that the defendant delivered no iron in September, and on the 30th of that month, I think, the plaintiff was entitled to receive, as damages, the difference on that day between the contract and market price of 166 tons. No other satisfactory principle can be suggested. The plaintiff might have resold this amount of iron to a sub-purchaser, and to satisfy this sub-contract might have bought at the then market price; or else must have paid the sub-purchaser the difference; and in either case would be entitled to receive it from the defendant. Then, when the 31st of October arrives, the same state of things recurs as to the second instalment of iron to be delivered;

[1] MARTIN and CHANNELL, BB., delivered concurring opinions.

and again the damages will be the difference between the contract and market prices on that day. And a similar calculation must be made with reference to the end of November. Therefore the plaintiff will be entitled to recover, altogether, the sum of the three differences at the end of the three months respectively.

It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when the defendant announced his intention of not delivering, or at all events when the first breach took place, and it became apparent that the contract could never be performed at all, the plaintiff might have entered into a new contract to the same effect as the old one for the months of October and November on as favorable terms; and if the plaintiff, on hearing he would never get delivery, was bound to go and obtain, if he could, the new contract suggested, then, no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fell, the defendants might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. Or again, by such a course, the plaintiff might be seriously injured and yet have no remedy. Suppose, for example, his new contract was with a person who proved insolvent. He would, in that case, be without redress; he would have lost his former contract, and his new one would turn out worthless. In either event, therefore, I do not think the plaintiff could be called upon to enter into a fresh contract. If he did, and thus obtained an advantage, he no doubt might save the defendant from some damages. But if he should suffer a loss, as by the insolvency of the new contractor, he could not make the defendant answer for it. And if it should happen that he might have done better for the defendant by waiting and

making no speculative contract, the defendant would in his turn have a fair right to complain that his loss had not been mitigated as far as possible.

The case of Frost *v.* Knight, L. R. 7 Ex. 111, has been referred to as showing that there is a difference between cases where the contract is treated as still subsisting and where it is treated as at an end. Now the plaintiff might, if he had so elected, have treated the contract as at an end when the defendant announced his intention to break it. But that is a matter of election on the plaintiff's part, and even although he had elected thus to treat the contract, yet in considering the question of damages they would still be estimated with reference to the times at which the contract ought to have been performed, that is, in this case, at the end of the months of September, October, or November. The damages should therefore be assessed on the principle I have indicated, and the rule made absolute to reduce the damages to £109 4*s*.

ROPER *v.* JOHNSON.

Common Pleas, 1873. L. R. 8 C. P. 167.

Brett, J.[1] This is an action brought upon a contract for the purchase and sale of marketable goods, whereby the defendant undertook to deliver them in certain quantities at certain specified times; and the action is brought for the non-performance of that contract. Now, in ordinary cases, the contract is to deliver the goods on a specified day, and there is no breach until that day has passed. In the case of marketable goods, the rule as to damages for breach of the contract to deliver is, the difference between the contract price and the market price on the day of breach. That is perfectly right when the day for performance and the day of breach are the same. Another form of contract is, as in Brown *v.* Muller, Law Rep. 7 Ex. 319, to deliver goods in

[1] Keating and Grove, JJ., delivered concurring opinions.

certain quantities on different days. The effect of the judgment in that case is that, the contract being wholly unperformed, there is a breach — a partial breach — on each of the specified days; such breaches occurring on the same days as the days appointed for the performance of the several portions of the contract. But the case of Hochster *v.* De la Tour, 2 E. & B. 678; 22 L. J. (Q. B.) 455, introduced this qualification, that, where one party, before the day for the performance of the contract has arrived, declares that he will not perform it, the other may treat that as a breach. That complication has arisen here: the contract being for the delivery of the goods on future specified days, the defendant has before the time appointed for the last delivery declared that he will not perform the contract, and the plaintiffs have elected to treat that as a breach and to bring their action.

Now, to entitle a plaintiff to recover damages in an action upon a contract, he must show a breach, and that he has sustained damage by reason of that breach. These two are quite distinct. All that Hochster *v.* De la Tour decided was this, that, if before the day stipulated for performance the defendant declares that he will not perform it, the plaintiff may treat that declaration as a breach of the contract, and sue for it. Now comes the question whether in such a case as this there is to be a different rule as to proof of the amount of damage which the plaintiff has suffered. The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day of performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach. It appears to me that what is laid down by Cockburn, C.J., in Frost *v.*

Knight, in the Exchequer Chamber, Law Rep. 7 Ex. 111, involves the very distinction which I am endeavoring to lay down, viz., that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; and that, when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach. Now, how does the Chief Justice deal with the matter? He deals first with the case of an action brought after the day for performance. He says: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but, in that case, he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it." He then treats of the other case: "On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time," that is, from non-performance of the contract at the time or times appointed for its performance. That clearly negatives Mr. Herschell's argument, and gives the rule for the assessment of damages in the way I have stated, viz., that they must be such as the plaintiffs would have sustained at the day appointed for performance of the contract. Then he goes on and shows the real distinction between the cases he has put, — "subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." He says further: "The

contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfilment of the contract; and, in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been or would have been diminished." He uses the very term I used in the course of the argument, and which Mr. Herschell objected to, viz., "*ought to have done.*" It seems to me to follow from that ruling that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that *primâ facie* that is the proper measure of damages; leaving it to the defendant to show circumstances which would entitle him to a mitigation. No such circumstances appeared here: there was nothing to show that the plaintiffs ought to have or could have gone into the market, — a rising market, — and obtained a similar contract. But I cannot help thinking that the Chief Justice's judgment in the case last referred to goes further, and says in effect that the plaintiffs were not bound to attempt to get a new contract.

It was upon precisely the same argument that the Chief Baron in Brown *v.* Muller, Law Rep. 7 Ex. 319, decided against Mr. Herschell that the plaintiff there, as a reasonable man, was not bound to make a forward contract. Baron Martin held the same, though apparently with some reluctance: but no doubt is expressed in the judgment of Baron Channell. If we had been altogether without authority, I should have come to the same conclusion. But I think we are bound by the authority of Frost *v.* Knight, and Brown *v.* Muller.

MASTERTON *v.* THE MAYOR OF BROOKLYN.

New York, 1845. 7 Hill, 62.

This was an action of covenant commenced in 1840, and tried at the New York Circuit in June, 1843, before Kent, C. Judge. The case was this: On the 26th of January, 1836, a covenant was entered into between the defendants and the plaintiffs, by which the latter agreed, at their own risk, costs, and charges, to furnish, cut, fit, and deliver (properly and sufficiently prepared for setting), at the site of the City Hall in the city of Brooklyn, all the marble that might be required for building the said City Hall, according to certain plans and specifications then exhibited and signed by the respective parties, and in conformity with such drawings, moulds, and patterns as should from time to time be furnished by the superintendent or architect of the said City Hall; all the said marble to be of the same quality as that used for the ornamental and best work on the new Custom House in the city of New York, and of the best kind of sound white marble from Kain & Morgan's quarry, in Eastchester, free from spalts, cracks, and blemishes, and wrought in the best manner of workmanship, and tooled and rubbed, &c. as should be ordered by the superintendent.[1]

[1] Part of the statement of facts is omitted.

On the 7th of March, 1836, the plaintiffs entered into a covenant with Kain & Morgan. This covenant, after referring to the one entered into with the defendants, and reciting a part of the same, provided that Kain & Morgan should furnish from their quarry, in Eastchester, all the marble required for erecting, completing, and finishing the City Hall in the city of Brooklyn.

The plaintiffs also proved that they commenced the delivery of marble in pursuance of the covenant between them and the defendants, and continued so to do until July, 1837, when the defendants suspended operations upon the building for want of funds, and refused to receive any more materials of the plaintiffs, though the latter were ready and offered to perform. The entire quantity of marble necessary to fulfil the contract on the part of the plaintiffs, according to the estimates made at the trial, was 88,819 feet. At the time the work was suspended, the plaintiffs had delivered 14,779 feet, for which they were paid the contract price. The plaintiffs then had on hand, at Kain & Morgan's quarry, about 3308 feet, which was suitably fitted and prepared for delivery. A witness swore that this was not of much value for other buildings, and would not probably bring over two shillings per foot. Other witnesses swore that, had the work progressed with ordinary diligence, it would have taken about five years to complete the contract on the part of the plaintiffs. Considerable testimony was given tending to show the cost of marble in the quarry, and the expense of raising, dressing, and transporting it to the place of delivery. And the plaintiffs offered to show "what would be the difference between the cost to them of the marble in the contract, and the price that was to be paid for it by the contract;" which evidence was objected to, but the Circuit Judge admitted it, and the defendants excepted. The witnesses answered that, in 1836, the difference would be about 20 per cent; in 1837, from 25 to 30 per cent; in 1838, about 25 per cent; in 1839, from 25 to 30 per cent; and in 1840, from 30 to 40 per cent. The witnesses also testified that the ordinary profit calculated

upon by master stone-cutters was from 10 to 20 per cent, and that 15 per cent was a fair living profit. All this testimony was objected to, but the Circuit Judge admitted it, and the defendants again excepted.

The Circuit Judge charged the jury, among other things, as follows: "The plaintiffs' contract with Kain & Morgan, if made in good faith, was entered into as a reasonable part of the performance by the plaintiffs of their own contract: and if the defendants, by stopping the work, obliged the plaintiffs to break their contract with Kain & Morgan, then the damages on the latter ought to be allowed to the plaintiffs, who would be responsible to Kain & Morgan for the same. . . . In fixing the damages to be allowed the plaintiffs, the jury are to take things as they were at the time the work was suspended, and not allow for any increased benefits they would have received from the subsequent fall of wages or subsequent circumstances."

Nelson, C.J. The damages for the marble on hand, ready to be delivered, was not a matter in dispute on the argument. The true measure of allowance in respect to that item was conceded to be the difference between the contract price, and the market value of the article at the place of delivery. This loss the plaintiffs had actually sustained, regard being had to their rights as acquired under the contract.

The contest arises out of the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform in all things on their part, and the case assumes that they were possessed of sufficient means and ability to have done so.

The plaintiffs insist that the gains they would have realized, over and above all expenses, in case they had been allowed to perform the contract, enter into and properly con-

stitute a part of the loss and damage occasioned by the breach: and they were accordingly permitted, in the course of the trial, to give evidence tending to show what amount of gains they would have realized if the contract had been carried into execution.

On the other hand, the defendants say that this claim exceeds the measure of damages allowed by the common law for the breach of an executory contract. They insist that it is simply a claim for the profits anticipated from a supposed good bargain, and that these are too uncertain, speculative, and remote to form the basis of a recovery.

It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business, to enter into a safe or reasonable estimate of damages. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfilment of an existing contract, constitutes no part of the damages to be recovered in case of breach. So a good bargain made by a vendor, in anticipation of the price of the article sold, or an advantageous contract of resale made by a vendee, confiding in the vendor's promise to deliver the article, are considerations always excluded as too remote and contingent to affect the question of damages. Clare *v.* Maynard, 6 Adol. & Ellis, 519, and Cox *v.* Walker, in the note to that case; Walker *v.* Moore, 10 Barn. & Cress. 416; Cary *v.* Gruman, 4 Hill, 627, 628; Chitty on Contracts, 458, 870.

The civil law is in accordance with this rule. "In general," says Pothier, "the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs; the debtor is therefore not answerable for these; but only for such as are suffered with respect to the thing which is the object of the obligation, *damni et interesse ipsam rem non habitam.*" 1 Evans' Poth. 91; and see Dom. B. 3, tit. 5, § 2, art. 3, 4, 5, 6.

When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may and doubtless often does exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtile to be reached by legal proof or judicial investigation. And besides, the consequences, when injurious, are as often perhaps attributable to the indiscretion and fault of the party himself, as to the conduct of the delinquent contractor. His condition, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs were embarrassed, than if it had been made with one in prosperous or affluent circumstances. Dom. B. 3, tit. 5, § 2, art. 4.

But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfil-

ment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement. The parties may indeed have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must therefore abide the hazard.

Such being the relative position of the contracting parties, it is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages. To separate it from the general loss would seem to be doing violence to the intention and understanding of the parties, and severing the contract itself.

The civil-law writers plainly include the loss of profits, in cases like the present, within the damages to which the complaining party is entitled. They hold that he is to be indemnified for "the loss which the non-performance of the obligation has occasioned him, and for the gain of which it has deprived him." 1 Evans' Poth. 90; Dom. B. 3, tit. 5, § 2, art. 6, 12. And upon looking into the common-law authorities bearing upon the question, especially the later ones, they will be found to come nearly if not quite up to the rule of the civil law.

In Boorman *v.* Nash, 9 Barn. & Cress. 145, it appeared that the defendant contracted in November for a quantity of oil, one half to be delivered to him in February following, and the rest in March; but he refused to receive any part of it. And the court held that the plaintiff was entitled to the difference between the contract price, and that which might have been obtained in market on the days when the contract ought to have been completed. See M'Lean *v.* Dunn, 4 Bing. 722. The case of Leigh *v.* Paterson, 8 Taunt. 540, was one

in which the vendor was sued for not delivering goods on the 31st of December, according to his contract. It appeared that, in the month of October preceding, he had apprised the vendee that the goods would not be delivered, at which time the market value was considerably less than on the 31st of December. The court held that the vendee had a right to regard the contract as subsisting until the 31st of December, if he chose, and recover the difference between the contract price, and the market value on that day. See also Gainsford *v.* Carroll, 2 Barn. & Cress. 624.

The above are cases, it will be seen, in which the profits of a good bargain were regarded as a legitimate item of damages, and constituted almost the only ground of recovery. And it appears to me that we have only to apply the principle of these cases to the one in hand, in order to determine the measure of damages which must govern it. The contract here is for the delivery of marble, wrought in a particular manner, so as to be fitted for use in the erection of a certain building. The plaintiffs' claim is substantially one for not accepting goods bargained and sold; as much so as if the subject matter of the contract had been bricks, rough stone, or any other article of commerce used in the process of building. The only difficulty or embarrassment in applying the general rule grows out of the fact that the article in question does not appear to have any well-ascertained market value. But this cannot change the principle which must govern, but only the mode of ascertaining the actual value of the article, or rather the cost to the party producing it. Where the article has no market value, an investigation into the constituent elements of the cost to the party who has contracted to furnish it, becomes necessary; and that, compared with the contract price, will afford the measure of damages. The jury will be able to settle this upon evidence of the outlays, trouble, risk, etc., which enter into and make up the cost of the article in the condition required by the contract, at the place of delivery. If the cost equals or exceeds the contract price, the recovery will of course be nominal; but if the contract

price exceeds the cost, the difference will constitute the measure of damages.

It has been argued that, inasmuch as the furnishing of the marble would have run through a period of five years — of which about one year and a half only had expired at the time of the suspension — the benefits which the party might have realized from the execution of the contract, must necessarily be speculative and conjectural; the court and jury having no certain *data* upon which to make the estimate. If it were necessary to make the estimate upon any such basis, the argument would be decisive of the present claim. But in my judgment no such necessity exists. Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present, as in actions predicated upon a failure to perform at the day.

It will be seen that we have laid altogether out of view the sub-contract of Kain & Morgan, and all others that may have been entered into by the plaintiffs as preparatory and subsidiary to the fulfilment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account, or become the subject matter of consideration at all, in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control over or participation in the making of the sub-contracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, these sub-contracts present a most unfit as well as unsatisfactory

basis upon which to estimate the real damages and loss occasioned by the default of the defendants. The idea of assuming that the plaintiffs were necessarily compelled to break all their sub-contracts, as a consequence of the breach of the principal one, and that the damages to which they may thus be subjected ought to enter into the estimate of the amount recoverable against the defendants is too hypothetical and remote to lead to any safe or equitable result. And yet, the fact that these sub-contracts must ordinarily be entered into preparatory to the fulfilment of the principal one, shows the injustice of restricting the damages, in cases like the present, to compensation for the work actually done, and the item of materials on hand. We should thus throw the whole loss and damage that would or might arise out of contracts for further materials, etc., entirely upon the party not in fault.

If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery; and the court and jury should see that in estimating this amount, it be made upon a substantial basis, and not left to rest upon the loose and speculative opinions of witnesses. The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from

the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital.

These views, it will be seen, when contrasted with the law as expounded and applied by the Circuit Judge, necessarily lead to the granting of a new trial.

BEARDSLEY, J. The Circuit Judge clearly erred in that part of his charge to the jury which related to the contract of the plaintiffs with Kain & Morgan. No damages are allowable on account of this contract, nor am I able to see how it can be regarded as relevant evidence upon any disputed point connected with the amount for which the defendants are liable.

The main question in the case arises out of the claim of the plaintiffs in respect to that portion of their contract with the defendants which remained wholly unexecuted in July, 1837. I think the plaintiffs are entitled to recover the amount they would have realized as profits, had they been allowed fully to execute their contract. The defendants are not to gain by their wrongful act, nor is that to deprive the plaintiffs of the advantages they had secured by the contract, and which would have resulted to them from its performance. The jury must therefore ascertain what it would probably have cost them to complete the contract, over and above the materials on hand; including the value of the marble required, the labor of quarrying and preparing it for use, the expense of transportation, superintendence, and insurance against all hazards, together with every other expense incident to the fulfilment of the undertaking. The aggregate of these expenditures is to be deducted from the amount which would be payable for the performance of this part of the contract, according to the prices therein stipulated, and the balance will be the damages which the jury should allow for the item under consideration.

Remote and contingent damages, depending on the result of successive schemes or investments, are never allowed for the violation of any contract. But profits to be earned and made by the faithful execution of a fair contract are not of

this description. A right to damages equivalent to such profits results directly and immediately from the act of the party who prevents the contract from being performed.

Where a vendor has agreed to sell and deliver personal property at a particular day, and fails to perform his contract, the vendee may recover in damages the difference between the contract price, and the market value of the property at the time when it should have been delivered. Chit. on Contracts, 445, 5th Am. ed.; Dey *v.* Dox, 9 Wend. 129; Gainsford *v.* Carroll, 2 Barn. & Cress. 624; Shepperd *v.* Hampton, 3 Wheat. 200; Quarles *v.* George, 20 Pick. 400; Shaw *v.* Nudd, 8 Id. 9; 2 Phill. Ev. 104. So, if a person who has agreed to purchase goods at a certain price refuses to receive them, he must pay the difference between their market value and the enhanced price which he contracted to pay. 2 Stark. Ev. 1201, 7th Am. ed.; Boorman *v.* Nash, 9 Barn. & Cress. 145.

These principles are strictly applicable to the present case. In reason and justice there can be no difference between the damages which should be recovered for the breach of an ordinary agreement to buy or sell goods, and one to procure building materials, fit them for use, and deliver them in a finished state, at a stipulated price. In neither case should the wrong-doer be allowed to profit by his wrongful act. The party who is ready to perform is entitled to a full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance. This is as sound in morals as it is in law. Shannon *v.* Comstock, 21 Wend. 461; Miller *v.* Mariner's Church, 7 Greenl. 51; Shaw *v.* Nudd, 8 Pick. 13; Swift *v.* Barnes, 16 Id. 196; Royalton *v.* The Royalton & Woodstock Turnpike Co., 14 Verm. Rep. 311.

The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken

up, so far as to absolve them from making further efforts to perform and give them a right to recover full damages as for a total breach. I am not prepared to say that the plaintiffs might not have brought successive suits on this covenant, had they from time to time made repeated offers to perform on their part, which were refused by the defendants; but this the plaintiffs were not bound to do.

There can be no serious difficulty in assessing damages according to the principles which have been stated. The contract was made in 1836; and, according to the testimony, about five years would have been a reasonable time for its execution. That time has gone by. The expense of executing the contract must necessarily depend upon the prices of labor and materials. If prices fluctuated during the period in question, that may be shown by testimony. In this respect there is no need of resorting to conjecture; for all the *data* necessary to form a correct estimate of the entire expense of executing the contract, can now be furnished by witnesses.

If the cause had been brought to trial before the time for completing the contract expired, it would have been impracticable to make an accurate assessment of the damages. This is no reason, however, why the injured party should not have his damages; although the difficulty in making a just assessment in such a case has been deemed a sufficient ground for decreeing specific performance. Adderly *v.* Dixon, 1 Sim. & Stu. 607, and the cases there cited. In Royalton *v.* The Royalton & Woodstock Turnpike Co., 14 Verm. R. 311, 324, an action was brought on a contract which had about twelve years to run. And the court held, in granting a new trial, that the rule of damages "should have been to give the plaintiffs the difference between what they were to pay the defendants, and the probable expense of performing the contract; and thus assess the entire damages for the remaining twelve years." No rule which will be absolutely certain to do justice between the parties can be laid down for such a case. Some time must be taken arbitrarily at which prices are to be ascertained and estimated; and the day of

the breach of the contract, or of the commencement of the suit, should perhaps be adopted under such circumstances. But we need not, in the present case, express any opinion on that point. No conjectural estimate is required to ascertain what would have been the expense of a complete execution of this contract; but the state of the market, in respect to prices, is now susceptible of explicit and intelligible proof. And where that is so, it seems to me unsuitable to adopt an arbitrary period; especially as the estimate of damages must in any event be somewhat conjectural.

I think the defendants are entitled to a new trial, and that the damages should be assessed upon the principles stated.

Bronson, J. As the marble had no market value, the question of profits involves an inquiry into the cost of the rough material in the quarry, and the expense of raising, dressing, and transporting it to the place of delivery. There may have been fluctuations in the prices of labor and materials between the day of the breach and the time when the contract was to have been fully performed; and this makes the question upon which my brethren are not agreed. I concur in opinion with the Chief Justice, that such fluctuations in prices should not be taken into the account in ascertaining the amount of damages, but that the court and jury should be governed entirely by the state of things which existed at the time the contract was broken. This is the most plain and simple rule: it will best preserve the analogies of the law; and will be as likely as any other to do substantial justice to both parties.

New trial granted.

GOODRICH *v.* HUBBARD.

Michigan, 1883. 51 Mich. 62.

Sherwood, J.[1] This is an action of assumpsit to recover damages of defendant for an alleged breach of contract, in

[1] Part of the opinion is omitted.

preventing plaintiffs from hauling and delivering a quantity of pine saw-logs. . . .

The referee finds as conclusions of law: 1st, By the terms of the contract of Oct. 25, 1879, the plaintiff had a right to haul said logs in the winter season, when there should be snow on or frost in the ground suitable to make roads to move said logs on sleighs; and there being no favorable weather to make suitable roads to haul said logs in the winter of 1879 and 1880, the plaintiff had until and during the winter of 1880 and 1881 to haul said logs under and by virtue of said contract. . . .

The fourth and last conclusion of law relates to the damages which plaintiff should recover. The fact is found that plaintiff, in the winter of 1880 and 1881, could have delivered said logs at fifty cents per thousand feet. The objection is that the measure of damages adopted by the referee is erroneous. The damage reported by the referee was for the loss of profits, the direct and natural result which the law presumes, springing right up under the breach of the contract complained of, in plaintiff not being allowed to fulfil his contract the second winter, on the basis of what the cost to him would have been for delivery. From the facts found the profit to him would have been fifty cents per thousand feet for the whole amount not delivered in the winter of 1879 and 1880. It is objected that the profits must be ascertained on the day of the breach; that to attempt to ascertain the damages in any other way would be speculative, uncertain, and conjectural. The case of Masterton *v.* Mayor of Brooklyn is cited as authority; but an examination of that case shows that the court made the market price on the day of the breach of the contract to govern in assessment of damages to depend upon the opposite party having elected to consider the contract broken before the arrival of the time for full performance. The facts of this case were somewhat exceptional, there being a claim for a breach of a contract running through a period of five years, of which about one year and a half only had expired, the court and jury having no certain

data upon which to estimate the profits for the remaining three years and a half. That case is not applicable here, where the election of the plaintiff to consider the contract broken before arrival of the time for its full performance does not appear; and upon the facts found it does appear that there are certain data for estimating the damages found. The consideration of profits cannot be separated in this case from the circumstances under which the work was to be done, and the prevention of which constitutes the breach making the defendants liable.

There is no element of uncertainty regarding the profits the plaintiff would have realized from the performance of the contract, and which must govern in the estimate of damages. There are no contingencies modifying or taking this case out of the rule laid down by this court in the case of Burrell *v.* New York & Saginaw Solar Salt Co., 14 Mich. 34. See also Loud *v.* Campbell, 26 Mich. 239; McKinnon *v.* McEwan, 48 Mich. 106.

There was no error in confirming the conclusions of law found by the referee, and the judgment rendered at the circuit is affirmed with costs.

BLOOD *v.* WILSON.

Massachusetts, 1886. 141 Mass. 25.

Morton, C.J. It is well settled in this Commonwealth, that when a special contract has not been fully performed, but the plaintiff has in good faith done what he believed to be a compliance with the contract, and has thus rendered a benefit to the defendant, he can recover the value of his services not exceeding the contract price, after deducting the damages which the defendant has sustained by the breach of the stipulations of the contract. Hayward *v.* Leonard, 7 Pick. 181; Reed *v.* Scituate, 7 Allen, 141; Atkins *v.* Barnstable, 97 Mass. 428; Denham *v.* Bryant, 139 Mass. 110.

The instructions at the trial, to which the defendant excepted, were in compliance with this rule, and were correct.

Exceptions overruled.[1]

STOWE *v.* BUTTRICK.

Massachusetts, 1878. 125 Mass. 449.

CONTRACT upon an account annexed for services rendered as keeper of certain property attached by the defendant, a deputy sheriff. Answer: 1. A general denial; 2. That the contract was illegal and void.[2]

LORD, J. The ruling of the presiding judge, that the contract which the plaintiff seeks to enforce is void because of illegality, cannot be sustained. Cutter *v.* Howe, 122 Mass. 541. Nor is the position of the defendant tenable that, inasmuch as he received no benefit from the services of the plaintiff, the plaintiff cannot recover. In an action upon a *quantum meruit* for services rendered to another upon his express request, the value of the services is not to be determined by the amount of benefit which the party requesting them receives. If A hires B to perform a particular service in a particular mode, the compensation is to be determined by the value of the services, and not by the benefit which A derives from it.

Exceptions sustained.

[1] But see Hayward *v.* Leonard, 7 Pick. 181, 187, where Parker, C.J., said: "The case was not put to the jury on the ground of acceptance or waiver, but merely on the question whether the house was built pursuant to the contract or not; and if not, the jury were directed to consider what the house was worth to the defendant, and to give that sum in damages. We think this is not the right rule of damages, for the house might have been worth the whole stipulated price, notwithstanding the departures from the contract. They should have been instructed to deduct so much from the contract price, as the house was worth less on account of these departures."

[2] The statement of facts and part of the opinion are omitted.

DERBY *v.* JOHNSON.

Vermont, 1848. 21 Vt. 17.

Book account. Judgment to account was rendered, and an auditor was appointed, who reported the facts substantially as follows: On the sixteenth day of March, 1846, the plaintiffs and defendants entered into a written agreement, by which the plaintiffs agreed to perform, in the most substantial and workmanlike manner, to the acceptance of the engineer of the Vermont Central Railroad Company, all the stone work, masonry, and blasting on the three miles of railroad taken by the defendants, at certain specified prices by the cubic yard. On the twenty-third day of March, 1846, the plaintiffs commenced work under the contract, and continued until the twenty-third day of April, 1846, when the defendant Johnson directed and requested the plaintiffs to cease labor and to abandon the farther execution of the contract. In consequence of this request and direction the plaintiffs immediately, on the same day, ceased laboring under the contract and abandoned its farther execution. In the afternoon of the same day, and after the men and teams of the plaintiffs had been taken from the work in pursuance of this notice and request of the defendants, the defendants did advise, or request the plaintiffs to do something more to a culvert, which was partly finished, and which had been that day condemned by the engineer, so that thereby a part of the culvert might be taken into the estimate of work done, which was to be made by the engineer the next day; but the plaintiffs declined so doing. From the nature of the work, and its unfinished state, at the time the work was discontinued, the value of a very considerable portion of the work performed could not be estimated by the prices specified in the contract. The plaintiffs presented an account of the number of days'

labor expended by themselves and the men in their employ, and of the materials furnished by them, in the prosecution of the work performed by them under the contract, amounting in the whole to $313.44; and the auditor found, that the items were reasonably and properly charged. The defendants presented an account in offset, which was allowed at $15.54. Upon these facts the auditor submitted to the court the question whether the plaintiffs were entitled to recover, and, if so, what amount. The County Court, March Term, 1848, — Bennett, J., presiding, — rendered judgment for the plaintiffs for the amount of their account, as claimed by them deducting the amount of the defendants' account. Exceptions by defendants.

HALL, J.[1] Treating the plaintiffs as having been prevented from executing their part of the contract by the act of the defendants, we think the plaintiffs are entitled to recover, as upon a *quantum meruit*, the value of the services they had performed under it, without reference to the rate of compensation, specified in the contract. They might doubtless have claimed the stipulated compensation, and have introduced the contract as evidence of the defendants' admission of the value of the services. And they might, in addition, in another form of action, have recovered their damages for being prevented from completing the whole work. In making these claims the plaintiffs would be acting upon the contract as still subsisting and binding; and they might well do so; for it doubtless continued binding on the defendants. But we think the plaintiffs, upon the facts stated in the report of the auditor, were at liberty to consider the contract as having been rescinded from the beginning, and to claim for the services they had performed, without reference to its terms.

The defendants, by their voluntary act, put a stop to the execution of the work, when but a fractional part of that which had been contracted for had been done, and while a large portion of that which had been entered upon, was in

[1] Part of the opinion is omitted.

such an unfinished condition, as to be incapable of being measured and its price ascertained by the rate specified in the contract. Under these circumstances, we think the defendants have no right to say, that the contract, which they have thus repudiated, shall still subsist for the purpose of defeating a recovery by the plaintiffs of the actual amount of labor and materials they have expended.

In Tyson *v.* Doe, 15 Vt. 571, where the defendant, after the part performance of a contract for delivering certain articles of iron castings, prevented the plaintiff from farther performing it, the contract was held to be so far rescinded by the defendant, as to allow the plaintiff to sustain an action on book for the articles delivered under it, although the time of credit for the articles, by the terms of the contract, had not expired. The court, in that case, say, "that to allow the defendant to insist on the stipulation in regard to the time of payment, while he repudiates the others, would be to enforce a different contract from that which the parties entered into." The claim now made in behalf of the defendants, that the rate of compensation specified in the contract should be the only rule of recovery, would, if sustained, impose upon the plaintiffs a contract which they never made. They did, indeed, agree to do all the work of a certain description on three miles of road, at a certain rate of compensation per cubic yard; but they did not agree to make all their preparations and do but a sixteenth part of the work at that rate; and it is not to be presumed they would have made any such agreement. We are not therefore disposed to enforce such an agreement against them.

The case of Koon *v.* Greenman, 7 Wend. 121, is much relied upon by the counsel for the defendants. In that case the plaintiff had contracted to do certain mason work at stipulated prices, the defendant finding the materials. After a part of the work had been done, the defendant neglecting to furnish materials for the residue, the plaintiff quit work and brought his action of general assumpsit. The court held he was not entitled to recover the value of the work, but only

according to the rate specified. The justice of the decision is not very apparent; and it does not appear to be sustained by the authorities cited in the opinion, — they being all cases, either of deviations from the contract in the manner of the work, or delays of performance in point of time. But that case, if it be sound law, is distinguishable from this in at least two important particulars. In that case the plaintiff was prevented from completing his contract by the mere negligence of the defendant; in this by his voluntary and positive command. In that case there does not appear to have been any difficulty in ascertaining the amount, to which the plaintiff would be entitled, according to the rates specified in the contract; whereas in this it is altogether impracticable to ascertain what sum would be due the plaintiffs, at the stipulated prices, for the reason that when the work was stopped by the defendants, a large portion of it was in such an unfinished state as to be incapable of measurement. That case is therefore no authority against the views we have already taken.

The judgment of the County Court is therefore affirmed.

DOOLITTLE *v.* McCULLOUGH.

Ohio, 1861. 12 Oh. St. 360.

Sutliff, J.[1] The evidence is voluminous, and it might be difficult for us to determine, from the record, whether or not it warranted the conclusion to which the jury must have arrived, not only that the conduct of Bates, toward the workmen of the plaintiff, was improper, and induced them to leave the work, but also, that the defendants were accountable for such conduct, from the fact that Bates was, at the time, their employee.

We have no difficulty, however, in coming to a conclusion, in relation to the first assignment of error.

[1] Part of the opinion is omitted.

The defendants below requested the court to instruct the jury, that if they found the work to have been done under the written contract previous to the abandonment of the contract by the parties in November, 1850, that the plaintiff could only recover for the actual amount of the work then done, at the contract price. The court refused to so instruct the jury, but instructed them that, if they believed the contract was terminated by the defendants, against the consent of the plaintiff, he would not be confined to the contract price, but might, in the action, recover what the work done was actually worth.

We regard the exception to the charge of the court, as having respect particularly to this part of the charge; and to this point our attention has been more particularly given.

What, then, is the rule of damages, in an action brought upon a cause of action arising under a contract terminated by the other party against the will of the party bringing the action? And is it true, that the price of services rendered, or goods delivered under a contract fixing, by its terms, such price, is to be in nowise thereby affected, after the contract has been terminated by the other party, against the will of the party performing?

This precise question, I believe, has not been heretofore decided by this court. In the case of Taft *v.* Wildman, 15 Ohio Rep. 123, tried in this court at the December term, 1846, the court say: "In contracts where the precise sum is fixed and agreed upon by the parties, as in many actions of assumpsit and covenant, the jury are confined to that sum."

In the case of Alder and another, assignees of Berkill, a bankrupt *v.* Keighley (H. T., 1846), 15 Meeson & Welsby, 117, Pollock, C. B., says: "But there are certain established rules according to which they [the jury] ought to find; and here, then, is a clear rule, — that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken." The action below was in general assumpsit, or upon an implied contract,

charging the defendant with a breach of the implied contract, and asking a judgment for the resulting damages. To sustain his action the plaintiff proved the amount of services by him rendered for the defendants, at their request, and also the value of the services in the estimation of the witnesses; and upon such a state of facts, in the absence of its being shown that there was a special agreement between the parties in relation to the same, and the amount to be paid for the services so proved to have been rendered, the law implies an agreement or promise, on the part of the defendants, to pay so much to the plaintiff as the services were reasonably worth. Such is presumed to have been the mutual understanding of the parties in the absence of any express promise. But as soon as it is made to appear that there was a special contract between the parties, under which the services were rendered, the law has respect to the actual contract, and will not presume or imply a different one; the object of courts being to enforce, not to make or change the contracts of parties.

In this view of the case, whether the contract has been fully performed by the plaintiff, or only partly performed, and prevented by the defendant; to obtain remuneration for the services so rendered, the plaintiff might, under our former practice, either commence an action of general assumpsit, to recover the amount such services were actually worth, or an action of special assumpsit, and recover for a breach of the express contract, under which the services had been performed. The only difference would be, that if the action were commenced upon the expressed contract, the plaintiff might have to prove the terms of the contract, and the rendering of the services according to its terms; whereas, if the action were in general assumpsit the plaintiff would only be required to prove the fact of having rendered the services at the instance of the defendant, and the value of the services; and it would then be incumbent upon the defendants to prove the special contract, to take the case out of the implied contract. But

when the special contract is proved, whether by the plaintiff, or defendant, under which the services were rendered; the special, and not the implied contract must determine the rights and liabilities of the parties arising in regard to the services. The price having been determined and mutually agreed upon by them, neither of the parties can vary the price so fixed by the contract. Nor, as to the price of the services actually rendered under the contract, while in force between the parties, can it avail the plaintiff, bringing his action to recover therefor, that since the rendering the services, the defendant has put an end to the special contract. The fact would still remain, that the services were rendered under a special contract, and at the price agreed upon, and expressed by the parties.

And if the action upon the contract so made by the parties, and terminated by the defendants against the will of the plaintiff, be brought to recover damages generally, the same rule would apply, as to the services actually rendered. The party having rendered the services would be entitled to recover at the rate agreed upon and stipulated in the contract between the parties, although of much less value than the price expressed in the contract; and, in like manner, the plaintiff would be restricted to the amount stipulated in the contract as the agreed price, although actually of much greater value.

The action of assumpsit is termed an equitable action. When brought to recover damages for breach of contract, whether express or implied, it is always for the recovery of money which the plaintiff, by reason of such delinquency of duty on the part of the defendant, is, in equity and good conscience, entitled to demand and receive of him. This is the argument: it is the duty of parties to perform their contracts; and where one party has been delinquent, in the performance of his contract, and damage has in consequence resulted to the other party, the party sustaining the damage has his right of action to recover the damage from the delinquent party. The actual damages resulting to the

plaintiff from the breach of the contract by the defendant is the amount of damage which the defendant is liable to pay and which the plaintiff is justly entitled to recover for such delinquency. This damage so occasioned the other party, by the delinquency of the party failing to perform, may consist, partly in a neglect to compensate the other party for the part performance, and partly in terminating the contract, before fully performed by the other party, and preventing his acquiring the profit and benefit under it which he would otherwise have derived and was legally entitled to; or, the damage may have resulted from either. But it is certain that where there has been a part performance, and that part paid for, under the contract, according to its terms, and the contract has then been terminated wrongfully by the party so having paid, it cannot be that the termination of the contract occasions damage or gives any right of action to the other party in regard to the part so performed and paid for under the contract. The damage in such a case, if any, arises from wrongfully precluding the other party from performing and receiving pay for that part of the contract unperformed on his part. And the question of damage, in such case, depends upon the terms of the contract, and circumstances of the case. If the proof shows that the plaintiff might have derived profit from the completion of the contract, on his part, he may be entitled to recover what the proof shows would have been the probable amount of the profit, which he has so lost, as damages to which he is entitled for such termination of the contract. But where the proof shows that the plaintiff, by fully performing, would have realized no profit, but in fact sustained a loss, he cannot in any sense be found to have sustained damage, or entitled to recover any sum as damage for the termination of the contract by the other party. . . .

But a better illustration of the correctness of the rule of damage can hardly be found than is by this case presented in the record before us. The plaintiff brought his action

below to recover the damages which he had sustained from the neglect of the defendants to perform their part of the contract. The only right of action asserted by the plaintiff in his declaration, was to recover the damage which the defendants, by their delinquency in regard to the contract subsisting between the parties, had occasioned the plaintiff. It is true, the plaintiff below only stated the performance of the services by himself, and complained of the defendants for not having paid him what the law would presume was agreed upon by the parties. But when an express agreement is proved to have been made by the parties, the law will not imply one; but looks to the existing contract between the parties.

How, then, stood the case between the plaintiff and defendants under that contract, as shown by the proof upon the trial; and what damage was McCullough thereby shown to have sustained from the delinquency or wrong-doing of Doolittle & Chamberlain, in regard to the contract between the parties?

The written contract required McCullough to do all the excavation at eleven cents per cubic yard. The proof shows that he proceeded to do the least expensive part of the work, the surface excavation, which, say the witnesses, might be done at from fifty to thirty-three per cent of the cost per yard, required to do the remaining part of the work embraced in the contract. The proof also showed that the plaintiff had been fully paid the eleven cents per cubic yard for all the excavation and work by him done under and according to the terms of the written contract. But the plaintiff, it is true, proves that the excavation which he did under the contract actually cost or was worth from eighteen to twenty cents per cubic yard; and that Doolittle and Chamberlain had terminated the contract without his consent. In this state of facts the law gives McCullough this equitable action of assumpsit to recover from Doolittle and Chamberlain the damage which their wrongful termination or disregard of the contract has caused to him, McCullough. But McCullough can only

recover the amount which he shows he has lost by such delinquency of Doolittle and Chamberlain. What then is the loss or damage which the proof shows McCullough sustained from the contract having been so terminated? McCullough's proof is, that it cost from eighteen to twenty cents to excavate, per cubic yard, that part of the job which he did; and all the proof goes to show that the residue of the excavation would cost from two to three times the amount per cubic yard, of that actually excavated. But the written contract, which the plaintiff complains that the other parties terminated, without his consent, required him to do all the excavation at eleven cents per cubic yard. And if the plaintiff's claim and proof are entitled to respect, the excavation actually done was worth from eighteen to twenty cents per cubic yard, the residue which the plaintiff has been so prevented from completing at eleven cents, would cost from thirty-eight to fifty-seven cents per cubic yard. It is shown by the proof that McCullough was paid more than the full average price of eleven cents per cubic yard, for all the excavation he did upon the job; the only damage, therefore, which he could possibly be entitled to recover, was the pecuniary loss he sustained by being thus prevented from completing the residue of his job at a cost of from thirty-eight to fifty-seven cents per cubic yard, and receiving therefor eleven cents per cubic yard. This is perfectly evident in fact; and it also results from making the contract the measure of damages to the same extent intended by the parties, both at the commencement and performance of the work. And only by reference to the contract can the true amount of damages suffered by the plaintiff be ascertained.

The instruction given by the court below to the jury, that the plaintiff was entitled to recover the actual cost of the services rendered, regardless of the price fixed by the express contract, would allow the plaintiff to recover a large sum of money from the defendants without consideration and without cause. Indeed, it would allow the plaintiff not only to recover, without any cause of action being shown, but, in fact,

his proof showed that the termination of the contract complained of, had, in fact, occasioned him no loss, but had actually saved him from ruinous loss; and to recover damages when he had sustained none, but had really derived a benefit and gain.

The judgment of the District Court must therefore be reversed.

WICKER *v.* HOPPOCK.

United States Supreme Court, 1867. 6 Wall. 94.

Swayne, J.[1] It is urged that the court erred in instructing the jury, that if the plaintiff was entitled to recover, the measure of damages was the amount of the judgments, with interest and the cost.

The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed. In some instances he is made to bear a part of the loss, in others the amount to be recovered is allowed, as a punishment and example, to exceed the limits of a mere equivalent.

It has been held that, "where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach thereof, at a trifling expense or with reasonable exertions, it is his duty to do it; and he can charge the delinquent party with such damages only, as with reasonable endeavors and expense he could not prevent." Miller *v.* Mariners' Church, 7 Greenleaf, 56; Russell *v.* Butterfield, 21 Wendell, 304; Ketchell *v.* Burns, 24 Ib. 457; Taylor *v.* Read, 4 Paige, 571; United States *v.* Burnham, 1 Mason, 57.

[1] Part of the opinion is omitted.

If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case, a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid.

In the note of Sergeant Williams to Cutler and others *v.* Southern and others, it is said that in all cases of covenants to indemnify and save harmless, the proper plea is *non damnificatus*, and that if there is any injury, the plaintiff must reply it, but that this plea "cannot be pleaded, when the condition is to discharge or acquit the plaintiff from such bond or other particular thing, for the defendant must set forth affirmatively the special manner of performance." Saunders, 117, note 1.

In Port *v.* Jackson, 17 Johnson, 239, the assignee of a lease covenanted to fulfil all the covenants which the lessee was bound to perform. It was held that the agreement was substantially a covenant to pay the rent reserved, as it should accrue; that a plea of *non damnificatus* was bad, and that the assignor could recover the amount of the rent in arrear as soon as a default occurred, without showing any injury to himself by the delinquency of the assignee. The assignee was liable also to the lessor for the same rent by privity of estate. The judgment was unanimously affirmed by the Court of Errors.

In The matter of Negus, 7 Wendell, 503, the covenant was to pay certain partnership debts, and to indemnify the covenantee, a retiring partner, against them. It was held that the covenant to indemnify did not impair the effect of the covenant to pay, and the same principle was applied as in the case of Port *v.* Jackson. We might refer to numerous other authorities to the same effect, but it is deemed unnecessary.

In the case before us, as in the cases referred to, the defendant made a valid agreement, in effect, to pay certain specific liabilities. They consisted of the judgments of Hoppock against Chapin & Co. If Wicker had fulfilled, the judgments would have been extinguished. As soon as Hoppock performed, the promise of Wicker became absolute. No provision was made for the non-performance of Wicker, and the further pursuit by Hoppock of the judgment debtors. Indemnity was not named. That idea seems not to have been present to the minds of the parties. The purpose of Hoppock obviously was to get his money without the necessity of proceeding further against Chapin & Co. than his contract required. There is no ground upon which Wicker can properly claim absolution. He removed and keeps the property he was to have bought in. The consideration for his undertaking became complete when it was exposed to sale. The amount recovered only puts the other party where he would have been if Wicker had fulfilled, instead of violating the agreement.

The rule of damages given to the jury was correct.

Judgment affirmed.

FURNAS *v.* DURGIN.

Massachusetts, 1876. 119 Mass. 500.

Devens, J.[1] The plaintiff claimed to recover of the defendant for breach of the agreement in the deed of the Hyde Park estate to the defendant, which was accepted by the defendant, and contained this clause: "Subject to mortgages amounting to $6500, which the grantee hereby assumes and agrees to pay, and all interest now due on existing mortgages on said property, together with the taxes due on the same."

[1] Part of the opinion is omitted.

For the debt secured by the mortgage the plaintiff was liable, and the question presented is whether the plaintiff is entitled to recover nominal damages only, as contended by the defendant, or whether he may recover the amount of a mortgage upon the estate of $1500, with interest, which neither party has paid. The precise question involved here was raised in Brewer *v.* Worthington, 10 Allen, 329, but it was not there necessary to decide it. If the agreement is to be treated as one merely to indemnify the plaintiff against any loss or damage by reason of this mortgage, it would be necessary to show that he had been in some measure damnified thereby. Little *v.* Little, 13 Pick. 426. But there is no reason why an agreement may not be made which shall bind the party so contracting to pay the debt which another owes, and thus relieve him or his estate from it, and, if the promise thus made is not kept, why the promisee should not recover a sum sufficient to enable him so to do. Such is the construction to be given to the agreement in the case before us. As a consideration for the property conveyed to him, the plaintiff conveyed the Hyde Park estate to the defendant, who contracted not to indemnify the plaintiff against, but to pay the mortgages upon it, and, if he has failed to do this, the plaintiff should be entitled to recover the amount which the defendant thus agreed to pay. It is a portion of the consideration money due the plaintiff, which he was to receive by payment of a debt for which he was liable, which he thus recovers, when the defendant fails to perform his promise. That the plaintiff should be kept subject to a debt from which the defendant agreed to relieve him is a continuing injury for which a sum of money which will enable him to discharge it is an appropriate remedy in damages.

That a promise to pay a debt due from the promisee, even where it has not been paid by him, is one upon which an action may be maintained and damages recovered to the amount of such debt, is held by many authorities. Holmes *v.* Rhodes, 1 B. & P. 638; Cutler *v.* Southern, 1 Saund. 116, Wms.' note; Toussaint *v.* Martinnant, 2 T. R. 100; Martin

v. Court, 2 T. R. 640; Hodgson *v.* Bell, 7 T. R. 97; Thomas *v.* Allen, 1 Hill, 145; Loosemore *v.* Radford, 9 M. & W. 657; Penny *v.* Foy, 8 B. & C. 11. In Lethbridge *v.* Mytton, 2 B. & Ad. 772, the defendant, by a settlement made upon his marriage, conveyed an estate upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estate to the amount of £19,000, within a year, and it was held, upon his failure to do so, that the trustees were entitled to recover the whole £19,000 in an action of covenant, although no payment had been made by them, and no special damage was laid or proved. Whether the contracts in some of these cases were anything more than contracts of indemnity, and therefore whether there could under our decisions have been any recovery, might perhaps be questioned. Cushing *v.* Gore, 15 Mass. 69; Little *v.* Little, *ubi supra*. That, however, need not now be considered, as we treat the agreement before us as one not for indemnity merely, but for payment. Nor is it important that the cases above cited are those in which the promisor agreed to pay on a particular day, or within a specified time. That cannot affect their application. An agreement to pay a debt, no time being specified, is an agreement to pay it when due, or forthwith, if it be already due. Here it appears that the promise was made on Aug. 19, 1872, that the mortgage debt which the defendant was to assume and pay became due on Sept. 1, 1872, and that the action was brought on March 10, 1873. That an action may be brought upon a promise to pay a debt due from the promisee, and, although he has not paid the same, full damages recovered, is recognized clearly by the case of Goodwin *v.* Gilbert, 9 Mass. 510. The question is not there discussed in the opinion of the court, which treats another inquiry as the only one important in the case, but, having disposed of that in favor of the plaintiffs, judgment was rendered for the full sum.

There is an embarrassment undoubtedly where the agreement is to pay a debt due from the promisor as well as the promisee. It is similar to that heretofore considered, where

there is an eviction by one holding a mortgage title, and the covenantee is allowed to recover in damages the amount of the mortgage upon which the covenantor is personally liable. As the Hyde Park estate, now the property of the defendant, is charged with the payment of the mortgage debt, if the plaintiff should not devote the sum recovered by him to its payment, the defendant might hereafter, in order to relieve his property, be compelled to pay the amount a second time. There is no mode, at law, by which this difficulty can be avoided, and the plaintiff enabled to receive the benefit of his contract. Loosemore *v.* Radford, *ubi supra.* Perhaps in equity, where a proper case for its interference was shown, a remedy would be afforded, that would secure the party paying under such circumstances from having the payment made by him devoted to any other object than that which would relieve him or his estate from further responsibility. However this may be, the want of elasticity in the forms of the common law, which does not enable us to make such a decree here as would guard the rights of all parties, should not prevent us from giving to the plaintiff the benefit of the contract which he has made, or compel him to remain subject to the burden of the debt, which the defendant has agreed to extinguish. As was suggested upon the other part of the case, the defendant may, if he will, perform his agreement and pay the debt at any time before final judgment, and the damages then to be recovered will be nominal only.

HORSFORD *v.* WRIGHT.

Connecticut, 1786. Kirby, 3.

Law, C.J. In actions on the covenant of warranty, the constant rule of this court has been to ascertain damages by the value of the land at the time of eviction, though the British rule is to give the consideration of the deed. The diversity in this respect between the British practice and ours

is undoubtedly founded in the permanent worth of their lands as an old country, and the increasing worth of ours as a new country. And it is supposed that the purchaser goes on, improves and makes the land better till he is evicted. But query, whether this reasoning will apply to an action brought on the covenant of seisin; for in that case the purchaser does not wait till he is evicted, but brings his action immediately upon discovery that his title is defective; and it is presumed he will immediately acquaint himself with the strength of his title.

The jury computed the damages by the latter rule, and returned a verdict which was accepted by the whole court.

STAATS *v.* TEN EYCK.

New York, 1805. 3 Caines, 111.

On the 7th of January, 1793, the testator, Barent Ten Eyck, by indenture of release, in consideration of £700 granted, bargained, and sold to the plaintiff, and one Dudley Walsh, in fee, two lots of ground in the city of Albany, covenanting, "That he the grantor was the true and lawful owner; that he was lawfully and rightfully seised in his own right of a good and indefeasible estate of inheritance in the premises; that he had full power to sell in fee-simple, and that the grantees should forever peaceably hold and enjoy the premises without the interruption or eviction of any person whatever, lawfully claiming the same." In the month of May following, Walsh, for a valuable consideration, conveyed his moiety of these lots to Staats, who, on the 30th of October, 1802, after due possession, by lease and release, granted one of them to Margaret Chim in fee, and covenanted to warrant and defend her in the peaceable possession thereof. In August, 1803, an ejectment was brought against Margaret Chim, in which a judgment was obtained for a moiety of the lot sold

to her, execution sued out, and this followed by a recovery in an action for the mesne profits. The value of the lot, from the moiety of which Margaret Chim was thus evicted, was at the time of the sale by Ten Eyck, £300, and that was the consideration paid for it. Margaret Chim, being thus evicted, brought her action against the plaintiff, and recovered for the moiety she had lost.

Upon these facts, which were submitted without argument, the following questions were raised for the determination of the court. 1st. Whether the plaintiff was entitled, under the covenants in Ten Eyck's release, to recover any more than a moiety of the consideration money paid for the lot from which Margaret Chim was evicted? 2d. Whether the interest of that consideration, and the increased value of the premises from the date of the deed to Margaret Chim, ought to be added? 3d. Whether the plaintiff was entitled to any retribution for the costs and damages he had sustained by the eviction and recoveries before mentioned?

KENT, C. J. This case resolves itself into these two points for inquiry: 1st. Whether, upon the covenants, the plaintiff be entitled to recover the value of the moiety of one lot at the time of eviction, or only at the time of the purchase, and to be ascertained by the consideration given? 2d. If the latter be the rule of damages, then, whether the plaintiff be also entitled to recover interest upon the purchase-money, and the costs of the eviction?

1. There are two covenants contained in the deed; the one, that the testator was seised in fee, and had good right to convey; the other, that the grantee should hold the land free from any lawful disturbance or eviction. The present case does not state distinctly whether the eviction was founded upon an absolute title to a moiety of one lot, or upon some temporary encumbrance. But I conclude from the manner of stating the questions, and so I shall assume the fact to be, that the testator was not seised of the moiety so recovered when he made the conveyance, and had no right to convey it. The last covenant cannot, then, in this case, have any

greater operation than the first, and I shall consider the question as if it depended upon the first covenant merely.

At common law, upon a writ of *warrantia chartæ*, the demandant recovered in compensation only the value for the land at the time of the warranty made, and although the land had become of increased value afterwards, by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value according to the then state of things, but as the land was when the warranty was made. Bro. Abr. tit. Voucher, pl. 69; Ibid. tit. Recouver in Value, pl. 59; 22 Vin. 144–146; Tb. pl. 1, 2, 9; Ub. pl. 1, 2, 3; 1 Reeves' Eng. Law, 448. This recompense in value, or *excambium*, as it was anciently termed, consisted of lands of the warrantor, or which his heir inherited from him, of equal value with the land from which the feoffee was evicted. Glanville, l. 3, c. 4; Bracton, 384, a. b. That this was the ancient and uniform rule of the English law, is a point, as I apprehend, not to be questioned; yet, in the early ages of the feudal law on the continent, as it appears (Feudorum, lib. 2, tit. 25), the lord was bound to recompense his vassal on eviction, with other lands equal to the value of the feud at the time of eviction; *feudum restituat ejusdem æstimationis quod erat tempore rei judicatæ.* But there is no evidence that this rule ever prevailed in England; nor do I find, in any case, that the law has been altered since the introduction of personal covenants, to the disuse of the ancient warranty. These covenants have been deemed preferable, because they secure a more easy, certain, and effectual recovery. But the change in the remedy did not affect the established measure of compensation, nor are we at liberty now to substitute a new rule of damages from mere speculative reasoning, and that too of doubtful solidity. In warranties upon the sale of chattels the law is the same as upon the sale of lands, and the buyer recovers back only the original price. 1 H. Black. 17. This is also the rule in Scotland, as to chattels. 1 Ersk. 206. Our law preserves in all its branches symmetry and harmony upon this subject. In the modern case of

Flureau *v.* Thornhill, 2 Black. Rep. 1078, the court of K. B. laid down this doctrine, that upon a contract for a purchase of land, if the title prove bad, and the vendor is without fraud incapable of making a good one, the purchaser is not entitled to damages for the fancied goodness of his bargain. The return of the deposit money, with interest and costs, was all that was to be expected.

Upon the sale of lands the purchaser usually examines the title for himself, and in case of good faith between the parties (and of such cases only I now speak), the seller discloses his proofs and knowledge of the title. The want of title is, therefore, usually a case of mutual error, and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin. The hardship of this doctrine has been ably exposed by Lord Kaimes in his examination of a decision in the Scotch law, that the vendor was bound to pay according to the increased value of the land. 1 Kaimes' Eq. 284–303; 1 Ersk. 206.

If the question was now *res integra*, and we were in search of a fit rule for the occasion, I know of none less exceptionable than the one already established. By the civil law the seller was bound to restore the value of the subject at the time of eviction, but if the thing had been from any cause sunk below its original price, the seller was entitled to avail himself of this and pay no more than the thing was then worth; for the Roman law, with its usual and admirable equity, made the rule equal and impartial in its operation. It did not force the seller to bear the risk of the rise of the commodity without also taking his chance of its fall. Dig. lib. 21, tit. 2, l. 78; Ibid. l. 66, § 3; Ibid. l. 64, § 1. So far the rule in that law appeared at least clear and consistent; but with respect to beneficial improvements made by the purchaser, the decisions in the Code and Pandects are jarring

and inconsistent with each other, and betray evident perplexity on this difficult question. Dig. lib. 19, tit. 1, 45, § 1; Cod. lib. 8, tit. 45, l. q., and Perezius thereon. The more just opinion seems to be, that the claimant himself, and not the seller, ought to pay for them, for *nemo debet locupletari alienâ jacturâ*, and this rule has, according to Lord Hardwicke, been several times adopted and applied by the English Court of Chancery. East In. Com. *v.* Vincent, 2 Atk. 38. While on this question, I hope it may not be deemed altogether impertinent to observe, that in the late digest of the Hindu law, compiled under the auspices of Sir William Jones, the question before us is stated and solved with a precision at least equal to that in the Roman code, and it is in exact conformity with the English law. On a sale declared void by the judge for want of ownership, the seller is to pay the price to the buyer, and what price? asks the Hindu commentator. Is it the price actually received, or the present value of the thing? The answer is, the price for which it was sold; the price agreed on at the time of the sale, and received by the seller; and this price shall be recovered, although the value may have been diminished. 1 Colebrook's Digest, 478, 479. Before I conclude this head, I ought to observe, that in the present case it does not appear that any beneficial improvements have been made upon the premises since the purchase by the plaintiff, and although some of my observations have been more general than the precise facts in the case required, yet the opinion of the court is not intended to be given, or to reach beyond the case before us.

2. The next point arising in this case is, whether the plaintiff is entitled to recover interest upon the purchase-money, and the costs of eviction? It is evident, that originally the vendee recovered only what was deemed equivalent to the purchase-money without interest; for he recovered other lands equal only in value to the lands sold at the time of the sale. The rule would have been the same at this day, had not the action for mesne profits been introduced, which takes away from the purchaser the intermediate profits of the land.

As long as he was permitted to reap the rents and profits, they formed a just compensation for the use of this money. Whether the action for mesne profits has not been carried too far in our law, by extending it to all cases, instead of confining it to a *malâ fide* possession, it is now too late to inquire. I should have strong doubts at least, upon the present rule, if the question was new, but considering it as the established rule, that the action for mesne profits lies generally, I am of opinion that the seller is as generally bound to answer for the interest of the purchase-money, and that the interest ought to be commensurate, in point of time, with the legal claim to the mesne profits. This right to interest rests on very plain principles. The vendor has the use of the purchase-money, and the vendee loses the equivalent by the loss of the mesne profits. The interest ought to commence from the time of the loss of the mesne profits. That time is not specifically stated in the present case, and the presumption is, that they were recovered from the date of the plaintiff's purchase, and from that time, I think, the interest ought to be calculated on the consideration sum.

As to the costs of suit attending the eviction stated in the case, it is very clear that the defendants are responsible under the covenant, for the testator was bound to defend and protect the plaintiff and his assigns in the title he had conveyed. At common law, he might have been vouched to come in, and been substituted as a real defendant in the suit. But the defendants are not answerable for the costs of the suit for mesne profits, as there the testator was not bound to defend.

My opinion accordingly is, that the plaintiff in the present case is entitled to recover the consideration paid for the moiety of the lot evicted, together with interest thereon from the date of the purchase, and the costs of suit in ejectment for the recovery of the same.

LIVINGSTON, J. To find a proper rule of damage in a case like this is a work of some difficulty; no one will be entirely free from objection, or not at times work injustice. To refund

the consideration, even with interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion where there has been no fraud, may also be attended with injustice, if not ruin. A piece of land is bought solely for the purposes of agriculture; by some unforeseen turn of fortune, it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bonâ fide* vendor to refund its present value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which value the property might rise, by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee. The safest general rule in all actions on contract, is to limit the recovery as much as possible to an indemnity for the actual injury sustained, without regard to the profits which the plaintiff has failed to make, unless it shall clearly appear, from the agreement, that the acquisition of certain profits depended on the defendant's punctual performance, and that he had assumed to make good such a loss also. To prevent an immoderate assessment of damages, when no fraud had been practised, Justinian directed that the thing which was the object of contract should never be valued at more than double its cost. This rule a writer on civil law applies to a case like the one before us; that is, to the purchase of land which had become of four times its original value when an eviction took place; but, according to this rule, the party could not recover more than twice the sum he had paid. This law is considered by Pothier as arbitrary, so far as it confines the reduction of the damages to precisely double the value of the thing, and is not binding in France; but its principle, which does not allow an innocent party to be rendered liable beyond the sum, on which he may reasonably have calculated, being founded in natural law and equity, ought in his opinion to be followed,

and care taken that damages in the cases be not excessive. Rather than adhere to the rule of Justinian, or leave the matter to the opinion of a jury, as to which may, or may not be excessive, some more certain standard should be fixed on. However inadequate a return of the purchase-money must be in many cases, it is the safest measure that can be followed as a general rule. This is all that one party has received, and all the actual injury occasioned by the other. I speak now of a case, and such is the present, where the grantee has not improved the property by buildings or otherwise, but where the land has risen in value from extensive causes. What may be a proper course, when dwelling-houses or other buildings, and improvements have been erected, we are not now determining. Why should a purchaser of land recover more than he has paid, any more than the vendee of a house or a ship? If these articles rise in value, the vendors would hardly, if there be no fraud, be liable to damages beyond the prices they had received with interest and costs, unless the plaintiffs could show some further actual injury which they had sustained in consequence of the bargain. The English books afford but little light on this point, although it is understood to be the rule in Great Britain to give only the consideration of the deed. The only thing to be found any ways relating to the subject, is in the Year Books in Hilary Term, 6 Edw. II., part 1, 187. It is there said, that in a writ of dower after the lands had been improved by the feoffee, they shall be extended or set off to the widow, according to the value at the time of alienation; and the reason assigned by Hargrave in his notes on Coke on Littleton, which is not, however, found in the Year Books, is, "that, the heir not being bound to warrant, except according to the value of the land at the time of the feoffment, it is unreasonable the widow should recover more of the feoffee than he could, in case of eviction, of the feoffor." In Connecticut, on the contrary, damages are ascertained by the value at the time of eviction, because of land's increasing worth, which is the very reason, perhaps, it should be otherwise. And although

the English practice be adverted to by the court in giving its opinion, it is supposed to be founded on the permanent value of their lands; but when we recollect that this has been the rule in Great Britain, at least from the commencement of the fourteenth century, since which time lands have greatly advanced in price, we must attribute its origin to some other cause; probably to its intrinsic justice and merit. Even in Connecticut, the rule applies only to actions on covenant of warranty, and probably not to those on covenant of seisin, because, in the latter case, it is supposed the party may immediately acquaint himself with the strength of his title, and bring his action as soon as he discovers it is defective. This reason is not very satisfactory, for with all his diligence a long time may elapse before his title is called in question, or doubts or suspicions raised about its validity.

Without saying, then, what ought to be the rule, where the estate has been improved after purchase, my opinion is, that where there has been no fraud, and none is alleged here, the party evicted can recover only the sum paid, with interest from the time of payment, where, as is also the case here, the purchaser derived no benefit from the property owing to a defective title. The plaintiff must also be reimbursed the costs sustained by the action of ejectment. It was his duty to defend the property, and the costs to which he has been exposed being an actual, not an imaginary loss, arising from the defendant's want of title, he ought to be made whole. In costs are included reasonable fees of counsel, as well as those which are taxable. If a grantee be desirous of receiving the value of land at the time of eviction,[1] he may by apt covenants in the deed, if a grantor will consent, secure such benefit to himself.

The other judges concurred.

Judgment for the plaintiff.

[1] The damages under the covenants of seisin and for quiet enjoyment are settled to be limited by the consideration money paid, the interest upon it, costs of eviction, and those of the suit brought; for improvements made,

FLUREAU *v.* THORNHILL.

Common Pleas, 1776. 2 W. Bl. 1078.

THE plaintiff bought at an auction a rent of £26 1*s.* *per* annum for a term of thirty-two years, issuing out of a leasehold house, which let for £31 6*s.* The sale was on the 10th of October, 1775. The price at which it was knocked down to him was £270, and he paid a deposit of 20 per cent, or £54. On looking into the title, the defendant could not make it out; but offered the plaintiff his election, either to take the title with all its faults, or to receive back his deposit with interest and costs. But the plaintiff insisted on a further sum for damages in the loss of so good a bargain; and his attorney swore he believed the plaintiff had been a loser by selling out of the stocks to pay the purchase money, and their subsequent rise between the 3d and the 10th of November; but named no particular sum. Evidence was given by the defendant, that the bargain was by no means advantageous, all circumstances considered; and the auctioneer proved that he had orders to let the lot go for £250. The defendant had

and the increased value of the property, a recovery cannot be had. Pitcher *v.* Livingston, 4 Johns. Rep. 1; Marston *v.* Hobbs, 2 Mass. Rep. 433. Where the plaintiff has not been evicted, but has continued in possession and received mesne profits to the day of action brought, interest for only six years will be allowed. Caulkin and others *v.* Harris, 9 Johns. Rep. 325. Under the covenant of "free from incumbrances," an antecedent mortgage is a breach, and the plaintiff will be entitled to recover his consideration money, interest, costs of defending himself in the suit by the mortgagee, and those of the action on the covenant. Waldo *v.* Long, 7 Johns. Rep. 173. If there has not been any eviction, the damages will be only nominal; but if the mortgage has been extinguished by the plaintiff, the sum disbursed for that purpose, interest, and costs, will be the measure. Prescott *v.* Trueman, 4 Mass Rep 627. It seems to be admitted in the case last cited, that should a plaintiff, under the circumstances detailed in it, be allowed to recover his consideration money, he would be entitled to hold the land also; but may it not be supposed that in such a case equity would deem him a trustee for his grantor, and oblige him to reconvey? [Reporter's note.

paid the deposit and interest, being £54 15*s.* 6*d.*, into court; but the jury gave a verdict, contrary to the directions of De Grey, C. J., for £74 15*s.* 6*d.*, allowing £20 for damages.

Davy moved for a new trial, against which *Glyn* showed cause; and by

De Grey, C. J. I think the verdict wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost.

Gould, J., of the same opinion.

Blackstone, J., of the same opinion. These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected. For curiosity, I have examined the prints for the price of stock on the last 3d of November, when three per cent's sold for 87½. About £310 must therefore have been sold to raise £270. And if it costs £20 to replace this stock a week afterwards (as the verdict supposes), the stocks must have risen near seven per cent in that period, whereas in fact there was no difference in the price. Not that it is material; for the plaintiff had a chance of gaining as well as losing by a fluctuation of the price.

Nares, J., hesitated at granting a new trial; but next morning declared that he concurred with the other judges.

Rule absolute for a new trial, paying the costs.

BAIN *v.* FOTHERGILL.

House of Lords, 1874. L. R. 7 H. L. 158.

This was a writ of error on a judgment of the Exchequer Chamber, which had affirmed a previous judgment of the Court of Exchequer (Law Rep. 6 Ex. 59) in an action brought by Bain and Paterson to recover damages for the

breach of an agreement, dated the 17th of October, 1867, by which Fothergill and Hankey undertook to sell, and transfer, to Bain and Paterson their interest in a certain mining royalty in the county of Cumberland, known as "Miss Walter's Royalty." [1]

Lord Chelmsford.[2] My Lords, this appeal brings in review before your Lordships the case of Flureau *v.* Thornhill and other cases which have engrafted exceptions upon it; and the first question to be considered is whether that case was rightly decided. The decision took place very nearly a century ago, in the year 1775, and has been followed ever since; not, however, without an occasional expression of doubt as to its soundness. Should your Lordships happen to share in this doubt, you would be extremely reluctant to disturb the rule which it laid down for the assessment of damages upon contracts for the sale of real estates, and which has been so long acted upon, unless you were clearly convinced that it is erroneous and ought no longer to be maintained.

Now, the rule established by Flureau *v.* Thornhill is, that upon a contract for the purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the intended purchaser is not entitled to any compensation for the loss of his bargain. The case is very shortly reported. Lord Chief Justice De Grey merely laid down the rule, without giving any reason for it. But Mr. Justice Blackstone said this: "These contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title."

The rule and the reason for it have been adopted and followed in subsequent cases. In Walker *v.* Moore, 10 B. & C. 416, where the plaintiff contracted with the defendant for the purchase of a real estate; the vendor, acting *bonâ fide*, delivered an abstract showing a good title, and the plaintiff,

[1] The statement of facts, and the answers of the judges to the questions of the Lords, are omitted.

[2] The concurring opinion of Lord Hatherley is omitted.

before he compared it with the original deeds, contracted to sell several portions of the property at a considerable profit. Upon an examination of the abstract with the deeds it was found that the title was defective. The plaintiff refused to complete his purchase, and brought his action claiming, amongst other damages, the profit that would have accrued to him from the re-sale of the property. It was held that he was not entitled to these damages. Mr. Justice Parke said: "A jury ought not, in the case of a vendor in possession, to give any other damages in consequence of a defect being found in the title, than those which were allowed in Flureau *v.* Thornhill, which was recognized in Johnson *v.* Johnson, 3 B. & P. 162; Bratt *v.* Ellis, Sugd. V. & P. 11th ed. Ap. No. 4, and Jones *v.* Dyke, Id. No. 5. In the absence of any express stipulation about it, the parties must be considered as content that the damages in the event of the title proving defective shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

The same learned judge recognized the authority of Flureau *v.* Thornhill in the case of Robinson *v.* Harman, 1 Ex. 855. He there said: "The case of Flureau *v.* Thornhill qualified the rule of the common law that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." Again in Pounsett *v.* Fuller, 17 C. B. 660, the court, following the rule in Flureau *v.* Thornhill, held that where a vendor failed to make a good title pursuant to his contract, the purchaser (in the absence of fraud or misrepresentation on the part of the vendor) was not entitled to damages for the loss of his bargain. Mr. Justice Cresswell, in delivering his opinion, said: "We are not called upon here to investigate the grounds upon which the decision in Flureau *v.* Thornhill proceeded, or to pronounce any opinion as to the wisdom or the expediency of the rule there laid down. It is enough for us to say that it has been received and acted upon in too many subsequent

cases to allow us now to call it in question." And in the recent case of Sikes *v.* Wild, the Court of Queen's Bench (1 B. & S. 587) and the Court of Exchequer Chamber (4 B. & S. 421) adopted the rule and acted upon it.

In a more recent case of Engel *v.* Fitch, Law Rep. 3 Q. B. 314, in error, 4 Id. 659, to which I shall presently have occasion more particularly to refer, Lord Chief Justice Cockburn, in an elaborate judgment, expressed his opinion that the case of Flureau *v.* Thornhill was unsatisfactory, and gave his sanction to Lord Chief Justice Abbott's doubt as to the soundness of the decision in that case.

There is, perhaps, some difficulty in ascertaining the exact grounds of the judgment in Flureau *v.* Thornhill; but, in addition to those which have been previously assigned, it seems to me that the following considerations may be suggested as in some degree supporting the correctness of the decision: "The fancied goodness of the bargain" must be a matter of a purely speculative character, and in most cases would probably be very difficult to determine, in consequence of the conflicting opinions likely to be formed upon the subject; and even if it could be proved to have been a beneficial purchase, the loss of the pecuniary advantage to be derived from a re-sale appears to me to be a consequence too remote from the breach of the contract. I am aware that in Engel *v.* Fitch, where, after the contract and before the breach of it, the purchaser contracted for a re-sale at an advance of £105, the Court of Queen's Bench and the Court of Exchequer Chamber, though pressed with the decision in Hadley *v.* Baxendale, 9 Ex. 341, held that "if an increase in value has taken place between the contract and the breach, such an increase may be taken to have been in the contemplation of the parties within the meaning of that case." But it must be borne in mind that this question as to damages depends, as Baron Alderson said, in Hadley *v.* Baxendale, upon what "may reasonably be supposed to have been in the contemplation of *both* parties at the time they made the contract, as the probable result of the breach of it." Now, although the

purchaser in Engel *v.* Fitch, when he entered into the contract, may have contemplated a re-sale at an advance, it is not at all likely that the loss of this profit should have occurred to the vendor as the probable result of the breach of his contract. The judges were no doubt influenced by the fact of the profitable re-sale having actually taken place, and were, in consequence, drawn aside from considering what must have been in the minds of both parties at the precise time when they made the contract.

The decision in Flureau *v.* Thornhill derives great additional authority from the opinion of Lord St. Leonards, who, in his work on the Law of Vendors and Purchasers, 14th ed., p. 360, considers that it was rightly decided.

The almost unanimous approval of the decision in Flureau *v.* Thornhill was broken in upon by an expression of disapprobation from Chief Justice Abbott in the case of Hopkins *v.* Grazebrook, 6 B. & C. 31, to which I have already alluded. He there said: "Upon the present occasion I will only say, that if it is advanced as a general proposition that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point I should desire to have time for consideration." As the case of Hopkins *v.* Grazebrook was one which, according to the opinion of the court, was not within the operation of the rule in Flureau *v.* Thornhill, there was no occasion for this passing reflection upon that case, which had been then silently acquiesced in for fifty years.

In Hopkins *v.* Grazebrook, a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him, and it was held that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages which he sustained by not having the contract carried into

effect. Chief Justice Abbott said: "The defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer some title, and having entered into a contract to sell without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract." And Justice Bayley said: "The case of Flureau *v.* Thornhill is very different from this, for here the vendor had nothing but an equitable title."

The decision itself in Hopkins *v.* Grazebrook cannot be supported. The seller in that case had undoubtedly an equitable estate in respect of which he had a right to contract. Therefore the language of Chief Justice Abbott, that "the defendant had entered into a contract to sell without the power to confer even the shadow of a title," is not warranted by the circumstances of the case, as the defendant could certainly have assigned his equitable estate; and thus the sole ground upon which he held him responsible for damages entirely failed. But although the facts in Hopkins *v.* Grazebrook did not justify the decision, yet the case has always been treated as having introduced an exception to the rule in Flureau *v.* Thornhill, and as having withdrawn from its operation a class of cases where a person, knowing that he has no title to real estate, enters into a contract for the sale of it. It is not correct to say, with Lord St. Leonards in his Vendors and Purchasers, 14th ed. 359, that Hopkins *v.* Grazebrook has not been followed. It has been recognized in several cases since, and in one to which I shall presently refer it has been expressly followed. In Robinson *v.* Harman, 1 Ex. 850, already mentioned as having sanctioned the decision in Flureau *v.* Thornhill, Baron Parke said: "The present case comes within the rule of the common law, and I cannot distinguish it from Hopkins *v.* Grazebrook." And Baron Alderson and Baron Platt expressed the same opinion. In Pounsett *v.* Fuller, Hopkins *v.* Grazebrook was treated as a valid authority by all the judges, the question which they considered being

whether the case fell within Flureau *v.* Thornhill, or the exception in Hopkins *v.* Grazebrook, and they decided that it was within the former case.

But in the case of Engel *v.* Fitch the Court of Queen's Bench, Law Rep. 3 Q. B. 314, and afterwards the Exchequer Chamber, Law Rep. 4 Q. B. 659, 664, proceeded expressly on the cases of Hopkins *v.* Grazebrook and Robinson *v.* Harman, the Chief Baron quoting the very words of the Lord Chief Justice, and relying on those cases. In that case the mortgagees of a house sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The purchaser re-sold the house at an advance in the price to a person who wanted it for immediate occupation. The mortgagor refused to give up the possession. The mortgagee could have ousted him by ejectment, but refused to do so on the ground of the expense. The purchaser brought an action upon the contract of sale, and it was held, that as the breach of contract arose not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to the contract, he could recover not only the deposit and the expenses of investigating the title, but damages for the loss of his bargain; and that the measure of such damages was the profit which it was shown he would have made upon a re-sale. It was after this decision in Engel *v.* Fitch that the plaintiffs in error declined to argue the present case in the Exchequer Chamber, as the authorities on the subject could only be freely reviewed by a higher tribunal. The case therefore comes to your Lordships' House without the advantage of the opinions of the learned judges of that court.

Notwithstanding the repeated recognition of the authority of Hopkins *v.* Grazebrook, I cannot, after careful consideration, acquiesce in the propriety of that decision. I speak, of course, of the exception which it introduced to the rule established by Flureau *v.* Thornhill, with respect to damages upon the breach of a contract for the sale of a real estate, for as

to the case itself not falling within the exception to the rule (if any such exists), I suppose no doubt can now be entertained. The exception which the court, in Hopkins *v.* Grazebrook, engrafted upon the rule in Flureau *v.* Thornhill, has always been taken to be this: that in an action for breach of a contract for the sale of a real estate if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain.

In Sedgwick on Damages, 4th ed. p. 234, mentioned by Mr. Baron Martin, in his judgment in this case, after a reference to the general rule as to damages, it is said, "To this general rule there undoubtedly exists an important exception which has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud and bad faith. In the former case, the plaintiff can only recover whatever money has been paid by him with interest and expenses. In the latter, he is entitled to damages for the loss of his bargain. The exception cannot, I think, be justified or explained on principle, but it is well settled in practice." I quite agree that the distinction as to damages in cases of contracts for the sale of real estate, where the vendor acts *bonâ fide*, and where his conduct is tainted with fraud or bad faith, is not to be "justified or explained on principle."

I fully agree in the doubt expressed by Mr. Justice Blackburn, in Sikes *v.* Wild, 1 B. & S. 594, as to the soundness of the exception in Hopkins *v.* Grazebrook, and in the observations which follow the expression of that doubt. The learned judge said, "I do not see how the existence of misconduct can alter the rule by which damages for the breach of a contract are to be assessed; it may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself. And if it be

said that the rule depends upon an implied condition resulting from the general understanding of vendors and purchasers (which is the ground taken by Mr. Justice Parke in Walker *v.* Moore, and I think the true one), and that the usage is such that this implied condition excludes such cases as Hopkins *v.* Grazebrook, I think that it will be worthy of the consideration of any court competent to review that case whether the strong opinion of Lord St. Leonards, repeated in the 13th edition of Vendors and Purchasers, does not show that the 'general understanding of conveyancers has been misapprehended.'" In the 14th edition of his work, pp. 360, 361, Lord St. Leonards quotes the whole of the above passage from Mr. Justice Blackburn's judgment, and adds, "this seems to be the true rule; it is a point which, whilst at the bar, I should have treated as beyond doubt."

Upon a review of all the decisions on the subject, I think that the case of Hopkins *v.* Grazebrook ought not any longer to be regarded as an authority. Entertaining this opinion, I can have no doubt that the judgment of the Court of Exchequer in the present case is right, whether it falls within the rule as established by Flureau *v.* Thornhill, or is to be considered as involving circumstances which have been regarded as removing cases from the influence of that rule; because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit.

It is only necessary to add that, in my opinion, if there were any exceptional cases from the rule in Flureau *v.* Thornhill, the present case would not fall within any of them, but is within the rule itself. The respondents, when they entered into the contract for the sale of Miss Walter's Royalty, had an equitable title to the mine which they might have perfected

by obtaining the lessors' consent to the assignment to them. This consent had not been obtained at the time the contract was entered into, and the fact was not communicated to the intended purchaser. The reason for this non-communication is stated in the case to be, that "either it did not cross the mind of the respondent Fothergill, or, if it did occur to him he forbore to mention it, feeling sure that no difficulty would arise with respect to such consent, and that it was therefore a matter of no importance." There is no reason to think that the respondents were not acting throughout under a *bonâ fide* belief that the lessors' consent might be obtained at any time upon application. They were prevented performing their contract, not from any fraud or wilful act on their part, but by an unexpected defect in their title which it was beyond their power to cure.

The case falls precisely within the terms of the rule as stated in Flureau *v.* Thornhill; and therefore, in my opinion, the judgment appealed from is right and ought to be affirmed.

HOPKINS *v.* LEE.

United States Supreme Court, 1821. 6 Wheat. 109.

Error to the Circuit Court for the District of Columbia.

This was an action of covenant, brought by the defendant in error (Lee), against the plaintiff in error (Hopkins), to recover damages for not conveying certain tracts of military lands, which the plaintiff in error had agreed to convey, upon the defendant in error relieving a certain incumbrance held by one Rawleigh Colston, upon an estate called Hill and Dale, and which Lee had previously granted and sold to Hopkins, and for which the military lands in question were to be received in part payment. The declaration set forth the covenant, and averred that Lee had completely removed the incumbrance, from Hill and Dale.[1] The counsel for the

[1] Part of the statement of facts and part of the opinion are omitted.

plaintiff in error prayed the court to instruct the jury, that in the assessment of damages, they should take the price of the military lands as agreed upon by the parties in the articles of agreement upon which the action was brought, as the measure of damages for the breach of covenant. But the court refused to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted; and a verdict and judgment thereon being rendered for the plaintiff below, the cause was brought by writ of error to this court.

LIVINGSTON, J. In the assessment of damages, the counsel for the plaintiff in error prayed the court to instruct the jury, that they should take the price of the land, as agreed upon by the parties in the articles of agreement upon which the suit was brought, for their government. But the court refused to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted. The rule is settled in this court, that in an action by the vendee for a breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle, whether the contract be for the sale of real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases, the vendee is entitled to have the thing agreed for, at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference. This is not an action for eviction, nor is the court now prescribing the proper rule of damages in such a case. *Judgment affirmed.*

MARGRAF *v.* MUIR.

New York Commission of Appeals, 1874. 57 N. Y. 155.

This action was against the vendor for specific performance of a contract to convey a lot of land, situate in Westchester County, and for damages for breach of the contract in case it could not be specifically performed.[1]

Earl, C. In this case the referee denied the equitable relief, but awarded damages for the breach of the contract, and in this he did not err, provided he adopted the proper rule of damage. The referee allowed the plaintiff as damages the difference between the contract price and the value of the land, thus placing him in the position he would have been if the contract had been performed. In this I think he erred. The general rule, in this State, in the case of executory contracts for the sale of land, is that, in the case of breach by the vendor, the vendee can recover only nominal damages, unless he has paid part of the purchase-money, in which case he can also recover such purchase-money and interest. Mack *v.* Patchin, 42 N. Y. 167; Bush *v.* Cole, 28 Id. 261; Pumpelly *v.* Phelps, 40 Id. 60. See, also, Lock *v.* Furze, Law Rep. 1 C. P. 441; Engle *v.* Fitch, Law Rep. 3 Q. B., 314.) But to this rule there are some exceptions based upon the lawful conduct of the vendor, as if he is guilty of fraud or can convey, but will not either from perverseness or to secure a better bargain, or, if he has covenanted to convey when he knew he had no authority to contract to convey; or, where it is in his power to remedy a defect in his title and he refuses or neglects to do so, or when he refuses to incur such reasonable expenses as would enable him to fulfil his contract. In all such cases, the vendor is liable to the vendee for the loss of the bargain, under rules analogous to those applied in the sale of personal property. Here no fraud was perpetrated on the vendee. He

[1] The statement of facts and part of the opinion are omitted.

knew that the vendor did not have title to the land, and that she could not convey to him without authority from some court; and he, knowing that the land was worth $2000, may be presumed to have known that no authority could be obtained to convey the land for $800, without, in some way, practising an imposition upon the court. This latter knowledge she did not have. Believing, as she did, that $800 was a fair price for the land, she had no reason to doubt that she could obtain authority to convey. Further than this, he knew that the land had been sold for taxes and a lease given. This she did not know. Under these circumstances, she could not get authority from the court to make a conveyance upon behalf of her minor children, and it appears that she could not procure the tax title. Hence there is no ground for imputing to her any blame for not making such a conveyance as her contract called for. These facts do not call for the application of an exceptional rule of damages in this case.

The case of Pumpelly *v.* Phelps, *supra*, is the widest departure from the general rule of damages in such case that is to be found in the books. In that case it was held, that where the vendor, in an executory contract for the conveyance of land, knew at the time he made the contract that he had no title, although he acted in good faith believing that he could procure and give the purchaser a good title, he was yet liable for the difference between the contract price and the value of the land. But there are two features which distinguish this case from that. In that case the vendee did not know that the vendor had no title. Here he did know it, and he knew, also, that she could get no title without imposing upon some court. Here also, even if she could have procured the authority of some court to convey, she still would have been unable to give such a title as her contract called for, on account of the outstanding tax title which was unknown to her when she contracted and which she could not procure.

The plaintiff agreed, subsequently, to the making of the

contract, if defendant would abate $100 from the contract price, that he would, at his expense, conduct the proceedings to procure from the court authority to convey, she co-operating with him, and would take a conveyance subject to the tax title. This did not alter the position of the parties so as to affect this case. She was in no sense culpable in not co-operating with him in imposing upon some court, and, to shield her from the damages claimed in this case, she was not obliged to allow him anything on account of the tax title. I am, therefore, of opinion that the referee erred in the rule of damages applied. The recovery should have been confined to the purchase-money paid (twenty-five dollars) and the interest thereon.

CARY *v.* GRUMAN.

New York, 1843. 4 Hill, 625.

On error from the Oneida C. P. Gruman sued Cary in a justice's court for the breach of a warranty of soundness on the sale of a horse; and after a trial before the justice, he rendered judgment in favor of Gruman, from which Cary appealed to the Common Pleas. The price paid for the horse was $90, and the breach complained of was a disease in the horse's eyes. On the trial in the Common Pleas, after Gruman, the plaintiff, had given evidence tending to prove the warranty and the disease, the defendant, in the course of cross-examining one of the plaintiff's witnesses, inquired what the horse would have been worth at the time of the sale, if he had been sound; declaring that one object of the question was, to show the amount of the plaintiff's damages, if entitled to any, under the following rule, which he contended to be the true one, viz., "that the proper measure of damages was the difference between the real value of the horse if sound, and his real value with the defect complained of." The court, though they received the answer for another purpose,

overruled it for the purpose proposed as above, holding the true measure of damages to be, the difference between the *price paid*, and the value with the defects. The trial proceeded accordingly; and the jury were charged to govern themselves by this rule.

The defendant below took exceptions to the decision and charge; and, the verdict and judgment being for the plaintiff below, the defendant brought error to this court on the above and other grounds.

Cowen, J.[1] It is unnecessary to inquire whether various exceptions taken in the case, mainly of a formal character, are well founded; for we think the court below erred in laying down the rule of damages. A warranty on the sale of a chattel is, in legal effect, a promise that the subject of sale corresponds with the warranty, in title, soundness, or other quality to which it relates; and is always so stated in the declaration when this is technically framed. It naturally follows that if the subject prove defective within the meaning of the warranty, the stipulation can be satisfied in no other way than by making it good. That cannot be done except by paying to the vendee such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not existed. There is no right in the vendee to return the article and recover the price paid, unless there be fraud, or an express agreement for a return. Voorhees *v.* Earl, 2 Hill, 288. Nor does it add to or detract any from the force or compass of the stipulation that the vendee may have paid a greater or less price. The very highest or the very lowest and most trifling consideration is sufficient. A promise in consideration of one dollar, that a horse which, if sound, would be worth $100, is so, will oblige the promisor to pay $100 if the horse shall prove totally worthless by reason of unsoundness, and $50 if his real value be less by half, and so in proportion. Nor could the claim be enhanced by reason that the vendee had paid $1000.

[1] Part of the opinion is omitted.

The rule undoubtedly is, that the agreed price is strong evidence of the actual value; and this should never be departed from, unless it be clear that such value was more or less than the sum at which the parties fixed it. It is sometimes the value of the article as between them, rather than its general worth, that is primarily to be looked to, — a value which very likely depended on considerations which they alone could appreciate. Things are, however, very often purchased on account of their cheapness. In the common language of vendors, they are offered at a great bargain, and when taken at that offer on a warranty, it would be contrary to the express intention of the parties, and perhaps defeat the warranty altogether, should the price be made the inflexible standard of value. A man sells a bin of wheat at fifty cents per bushel, warranted to be of good quality. It is worth one dollar if the warranty be true; but it turns out to be so foul that it is worth no more than seventy-five cents per bushel. The purchaser is as much entitled to his twenty-five cents per bushel in damages as he would have been by paying his dollar, and if he had given two dollars per bushel he could recover no more. So, a horse six years old is sold for fifty dollars with warranty of soundness. If sound, he would be worth $100. He wants eyesight, and thus his real value is reduced one-half. The vendee is entitled to fifty dollars as damages; and could recover no more had he paid $200.

The tests of real value or the falling off in that value because the warranty proves to be false is one thing. The price agreed for the horse, said Lord Denman, C.J., in Clare *v.* Maynard, 7 Carr. & Payne, 741, is, I think, "not conclusive as to its value, though I think it very strong evidence." Again, "my view of it is that the fair value of the horse, if sound, is the measure of damages, and that the sum the plaintiff gave is only the evidence of value." . . .

The rule has certainly been laid down without express qualification, that the measure of damages is the difference between the real value of the horse and the price given. Caswell *v.* Coare, 1 Taunt. 566. This was right in the par-

ticular case. No evidence of actual value, independently of the price paid, was given or offered. Voorhees *v.* Earl, before cited, was a warranty that 60 barrels of flour were superfine. They proved to be of inferior quality; and, after looking at the cases, we thought they gave the measure of damages as it should stand on principle, viz., the difference between the value of the 60 barrels, at the time of the sale, considered as superfine flour, and the value of the inferior article sold. See 2 Hill, 291. In 2 Phil. Ev. 105, Am. ed. of 1839, the rule is laid down thus: "If he (the purchaser) keep the horse, he may recover the difference between the value of such horse perfectly sound, and the value of the identical horse at the time of the warranty." The author adds several cases of enhancement arising from special damage, and illustrating a class of exceptions which we admitted to exist in Voorhees *v.* Earl. Restricting the rule in Caswell *v.* Coare to the case as it stood on the evidence — and so it should clearly be restricted — there is no discrepancy in the English cases.

It is impossible to say, nor have we the right to inquire, whether the real value of the horse in question, supposing him to have been sound, would have turned out to be more or less than the $90 paid. Suppose the jury thought, with one witness whom the court allowed to state such value for another purpose, that it was not more than $80; the plaintiff then recovered ten dollars, not on account of the defect, but because he had been deficient in care or sound judgment as a purchaser. On the other hand, had the horse been actually worth $100, the defendant would have been relieved from the payment of the ten dollars because he had made a mistake of value against himself. The cause might thus have turned on a question entirely collateral to the truth of the warranty.

In confining the defendant to the rule of Caswell *v.* Coare, as an unqualified one, we think the court below erred; and that for this reason the judgment must be reversed. We direct that a *venire de novo* issue from that court; and that the costs shall abide the event. *Rule accordingly.*

HOFFMAN *v.* CHAMBERLAIN.

New Jersey Court of Errors and Appeals, 1885. 40 N.J. Eq. 663.

Bill to foreclose a mortgage given to secure the purchase money of certain furniture. Defence, a failure of title to part of the property, viz., three Baltimore heaters.[1]

Reed, J.[2] In respect to these heaters, neither of the vendors to Mrs. Chamberlain had title, and there should be a deduction from the amount due upon the six outstanding notes for this failure of title.

The question then arises, What is the proper measure of the deduction to be allowed? Perhaps no feature relating to the sale of chattels has been so little and so unsatisfactorily discussed and determined in previous adjudications as this. It seems to be the settled doctrine in the English courts that where there is a failure of title to all the chattels sold, the purchaser can treat the transaction as presenting an instance of an entire failure of consideration, and may sue for the money paid. Eichholz *v.* Bannister, 17 C. B. (N. S.) 708.

There is, however, no case decided in their courts that holds that the right of a purchaser is limited to a recovery of this sum in an action brought, not for the money paid, but for a breach of the warranty of title. The rule is entirely settled that for a breach of a covenant for title to real property the measure of damages is the consideration paid and the interest upon such sum. This rule, early settled in the English courts, is the rule in this and many other States.

This rule has also been adopted in many States in this country as equally applicable to breaches of the warranty of title to personal property. The following cases display the extent to which this rule has here been adopted: Noel *v.* Wheatly, 30 Miss. 181; Ware *v.* Weathnall, 2 McCord, 413; Wood

[1] This short statement is substituted for that of the court.

[2] Part of the opinion is omitted.

v. Wood, 1 Metc. (Ky.) 512; Crittenden *v.* Posey, 1 Head, 311; Ellis *v.* Gosney, 7 J. J. Marsh. 111; Arthur *v.* Moss, 1 Oreg. 193; Goss *v.* Dysant, 31 Tex. 186.

A perusal of the opinions in these cases and the reasons given for the adoption of this rule in the sale of chattels, is not calculated to vindicate the wisdom of the rule.

The doctrine, so far as it is applicable to breaches of the covenants in real conveyances, rests upon grounds which appertain to the character of real estate. The reason for the adoption of this rule in this class of actions is set forth at length by Kent in the leading case of Staats *v.* Ten Eyck, 3 Cai. Cas. 111.

The rule is an exception to the general principle which underlies the measure of damages for breaches of contract, namely, the standard of compensation. This latter rule applies to actions for breaches of warranties of quality in the sale of chattels to its full extent. In what respect the loss resulting from a breach of the warranty of title differs from that resulting from a breach of the warranty of quality in dealing with personal property, is difficult to conceive. Outside of the vice of extending an exception to a general rule in any event, there appears to be no reason why the rule of recovery should not be uniform in actions upon both kinds of warranties. Nor do the cases in which the exceptional rule applicable to damages for breaches of real covenants has been extended to warranties of title to chattels, in my judgment, present any reason for such prejudicial action. In nearly all of these cases the question arose in States when and where slavery prevailed, and was in respect to breaches of a warranty of title to slaves. The reason stated in many of the cases for the adoption of the rule was the precarious and fluctuating character of that kind of property. In other cases the court is content with the citation of the early case of Armstrong *v.* Percy, 5 Wend. 535, as the authority for the rule.

In regard to the latter case, it may be remarked that the rule is drawn from a remark of the judge who delivered the

opinion in that case, in a single sentence, unsupported by authority or reason. And this remark was made in the face of the result in the previous case of Blasdale *v.* Babcock, 1 Johns. 517, in which there was a recovery of the value of a horse and costs upon a warranty of title. The matter actually decided in the case of Armstrong *v.* Percy was, that, where an action had been brought against the purchaser by the real owner, who was not the vendor, the purchaser could recover from the vendor the money paid, besides the costs of the suit which he was obliged to defend.

There was no suggestion that the rule controlling in this respect an action for breach of this kind of warranty differed from the rule in actions upon other kinds of warranties. The cases cited, namely, Curtis *v.* Hannay, 3 Esp. 82; Caswell *v.* Coare, 1 Taunt. 566; Lewis *v.* Peake, 7 Taunt. 153, were all actions for breach of warranty of quality, and the measure of damages in these cases was shown to have been dependent upon the pleadings. In the first two of these cases no special damages were set out in the declaration, and there was nothing but the amount of the consideration to show what was lost, so that was ruled to be the measure of damages. In the last case the claim for damages having been broader, it was permitted to the plaintiff to recover, in addition to this, the costs of a suit against him by his vendee, to whom he had sold with a similar warranty.

There is nothing in the matters decided in the case of Armstrong *v.* Percy which fixes, as a rule, that for the present kind of warranties the measure of damages is limited to the consideration paid, and interest. The rule, I think, in all actions of this kind, is compensation. Where no special damages are set forth, the measure of the loss is the value of the property purchased; and where there is no evidence of value but the consideration paid, that will be taken as the standard of value. Where there is a failure of title to a part, or an inferior title only is sold, the loss is the difference between the property as conveyed and its value, had the title been as warranted.

In support of the view that this general rule, applicable to damages, appertains to actions upon breaches of warranties of title to chattels are the cases of Grose *v.* Hennessey, 13 Allen, 389; Rowland *v.* Shelton, 25 Ala. 217, and the text of Mr. Sedgwick, Meas. of Dam., 294. My opinion is that there should be a deduction, in this case, of the difference between the value of the entire lot of chattels sold and the value of the lot without the heaters. The only evidence of the value of the entire lot is what it was sold for, namely, $1800. The evidence in regard to the value of the heaters fixes their value at about $200.

Adopting these values, there should be a deduction for the latter sum from the notes, as of the date of the sale, leaving due $400 and interest.

The decree should be reversed.

Decree unanimously reversed.

HUTCHINSON *v.* SNIDER.

Pennsylvania, 1890. 137 Pa. 1.

Sterrett, J. This action of covenant, brought by Isaac Hutchinson against the executors of John Snider, deceased, is grounded on the tripartite agreement, executed in December, 1864, between said Hutchinson and Snider and Basil Brownfield, wherein each of said parties agreed with the other two to put down a well on his own land for the purpose of procuring therefrom oil or petroleum, and, if successful, bound himself to deliver to each of them one-twentieth of the oil or petroleum taken from said well, etc. For the purpose of prosecuting the work, the agreement further provides, *inter alia*, that the parties shall jointly purchase and hold a set of boring tools and ropes; that each shall "be at the expense of putting down the well on their own premises, as follows: The said Hutchinson to be at all the expense of sinking his well; the said Brownfield to be at all the expense

of sinking his well; the said Snider to be at all the expense of sinking his well; each party to keep the tools in order while using them in boring said wells. . . . All of said wells are to be sunk within two years;" and the interest of one-twentieth in the well put down by each party, above provided for, shall continue for thirty years from the time he commences boring said well.

Shortly after the agreement was executed, Hutchinson put down a well to the depth of 768 feet, without finding oil or any indication thereof. Neither Snider nor Brownfield ever commenced to bore on their respective lands, presumably because it became manifest that oil could not be found in the county; and, in fact, after the lapse of nearly a quarter of a century, none has been found. In 1866 Snider paid Hutchinson his full share of the cost of the tools and ropes.

Nearly twenty years after the right of action accrued, this suit was brought to recover damages for breach of Snider's covenant to put down the well. On the trial, it was successfully claimed that the proper measure of damages was one-third of Hutchinson's actual outlay in putting down his well, with interest, etc., and the specifications of error all relate to that question. The first is to the admission of evidence to prove the cost of putting down Hutchinson's well; the second and third, to the refusal of the court to charge that plaintiff was not entitled to recover; and the fourth, to that part of the charge wherein the jury was instructed that, in case they found for plaintiff, the proper measure of damages "would be one-third of the actual cost of sinking the well," etc. There appears to have been no evidence whatever to which any other measure of damages could apply.

It is unnecessary to consider the assignments of error separately. The single question involved in all of them is whether the learned president of the Common Pleas did not err in his rulings as to the proper measure of damages. We are clearly of opinion that he did. In view of the express provision of the contract that Hutchinson, as well as each of the others, should "be at all the expense of sinking his

well," that is, the well on his own land, there appears to be no possible connection between the failure of Snider to put down a well on his land, and the outlay of plaintiff in putting down his well. The latter cannot, in any sense, be regarded as the result, directly or indirectly, of Snider's breach of covenant. They are wholly independent of each other. The only interest that plaintiff had, under the contract, in the well that Snider agreed to put down, was one-twentieth of the oil that might be obtained. If plaintiff had been able to show that he sustained any loss, in that regard, in consequence of Snider's failing to do what he agreed to perform, to that extent he would have been entitled to recover. But no evidence tending, in the slightest degree, to prove any such loss was introduced, and without it plaintiff was not entitled to recover. Nothing is better settled than that damages, for which compensation may be justly claimed and allowed, are such only as naturally and ordinarily flow from the breach of contract complained of. They must be such as may fairly be supposed to have entered into the contemplation of the parties when they made their contract, or such as might, according to the ordinary course of things, be expected to follow its violation: Billmeyer *v.* Wagner, 91 Pa. 92; Griffin *v.* Colver, 16 N. Y. 489; Sedgwick on Dam. 78, 79. Further elaboration of the subject is unnecessary. The specifications of error are sustained. *Judgment reversed.*

BERNSTEIN *v.* MEECH.

New York, 1891. 130 N. Y. 354.

Bradley, J.[1] By contract of date August 4, 1887, between the parties, the defendants agreed to furnish to the plaintiff the opera house known as the Academy of Music, in the city of Buffalo, December twenty-second, twenty-third,

[1] Part of the opinion is omitted.

and twenty-fourth, for four performances by the Jarbeau Comedy Company, and for that purpose the plaintiff agreed to furnish the services of that company during that time, and to take as the consideration fifty per cent of the gross receipts of all sums realized from the performances. When this contract was executed, each of the parties had the right to assume that the other would observe its stipulations. The performances did not take place, and the reason why they did not, the plaintiff charges, was attributable to the breach of the contract by the defendants. The purpose of this action was to recover damages as the consequence. . . .

There was no error in the refusal of the court to direct a verdict for the defendants.

The remaining questions have relation to the damages which were the subject of the plaintiff's recovery. The general rule on the subject would permit him, in case of breach by the defendants, to recover the value of his contract. And that was dependent upon the receipts to be realized from the contemplated performances by the plaintiff's company. The results which would in that respect have been produced if the company had been permitted to perform the contract were speculative, and by no probative means ascertainable. It is contended on the part of the defendants that recovery could be founded on no other basis, and therefore the plaintiff could recover nominal damages only. The value of the contract to the plaintiff was in the profits, and in the amount of them which may have been realized over his expenses attending its performance. Those profits not being susceptible of proof, were not the subject of recovery. But by the breach of the contract by the defendants, the plaintiff was denied the opportunity which the observance of it could have given him to realize fifty per centum of such receipts as would have been produced by it. His loss also consisted of the expenses by him incurred to prepare and provide for such performance. While the plaintiff was unable to prove the value in profits of his contract, he was properly permitted to recover the amount of such loss, as it appeared he had suffered by the defend-

ants' breach. Griffin *v.* Colver, 16 N. Y. 489. The evidence warranted the conclusion that the plaintiff, through his agent, made preparations for the performance of the contract, and that the plaintiff with his troupe appeared at Buffalo, prepared and in readiness to do so. The amount of his expenses incurred for the purpose of such performance was proved, and they were the basis of the recovery. It is unnecessary to refer specifically to the items of those expenses. The jury were, upon the evidence, permitted to find that, to the amount of the recovery, they were legitimately incurred for the purposes of the performance of the contract, and that with a view to such purpose the plaintiff suffered a loss to that extent. Those expenses may be deemed to have been fairly within contemplation when the contract was made. It cannot be assumed that any part of this loss would have been sustained by the plaintiff if he had been permitted to perform his contract. And assuming, as we must here, that the exclusion of the plaintiff's company from the use of the opera house at the time in question was caused by the defendants' breach of the contract, the plaintiff's loss, equal to the amount of his expenses legitimately and essentially incurred for the purpose of its performance, was the consequence of their default, and properly recoverable by him. Driggs *v.* Dwight, 17 Wend. 71; Giles *v.* O'Toole, 4 Barb. 261; Taylor *v.* Bradley, 39 N. Y. 129, 142. These views lead to the conclusion that none of the exceptions were well taken, and that the judgment should be affirmed.

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